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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1993

HON. EDWARD R. KORMAN, UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 specifies that orders authorizing electronic surveillance may be sought by the government from "a judge of a United States district court or a United States court of appeals." The 1976 amendments to the Magistrates Act provide that "notwithstanding any provision of law to the contrary * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court * * *." The Magistrates Act also permits a judge to delegate to a magistrate judge "such additional duties as are not inconsistent with the Constitution and laws of the United States." The following question is presented:

> Whether a federal district judge may delegate to a magistrate judge the task of reviewing the government's application under Title III for an order authorizing electronic surveillance.

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PETITION FOR A WRIT OF CERTIORARI

The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, respectfully petitions for a writ of certiorari to review the judgment

of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 10 F.3d 931. The order of the court of appeals denying rehearing or rehearing in banc (App., *infra*, 49a) is unreported. The opinion of the district court (App., *infra*, 29a-48a) is reported at 784 F. Supp. 1019.

JURISDICTION

The decision of the court of appeals was issued on November 23, 1993. A timely petition for rehearing and suggestion of rehearing in banc was denied on February 15, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 112; the Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, as amended; and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, are reproduced at pages 52a-54a of the Appendix, *infra*.

STATEMENT

In our federal system, the adjudication of cases is a task that may be performed only by life-tenured Article III judges. Unfortunately, the almost ceaseless tide of new federal cases has imposed serious strains on the capacities of the federal judiciary and has led to the appointment of ever more judges to perform the tasks assigned to that judiciary. On the other hand, there are many significant and useful functions that the Constitution allows other judicial officers, such as federal magistrate judges, to perform. The ability of such officers to relieve Article III judges of numerous significant and time-

consuming but lawfully delegable functions has played an increasingly important role in recent years in enabling the federal judiciary to limit its size and still keep its head above water as the tide of litigation continues to sweep in.

One of the traditional judicial but non-adjudicatory functions that the Constitution contemplates may be performed by an official such as the magistrate judge is the issuance of search warrants. While the regulation of governmental intrusions into personal privacy is an undeniably important function of the Judicial Branch, the Fourth Amendment recognizes that the independence and detachment that are the paramount requisites for the reasonable exercise of this power can be found in federal magistrates.

Of all the non-adjudicatory functions federal judges are called upon to perform, few are more time-consuming – or better suited to the skills, training, and experience of federal magistrate judges – than the review of Title III applications for authorization to conduct electronic surveillance. That is what led petitioner, United States District Judge Edward R. Korman, to enter the order at issue in this case, delegating to a federal magistrate judge the task of reviewing, approving, and overseeing the administration of Title III electronic surveillances.

Judge Korman's action represented an important experiment in the use of magistrates to conserve scarce judicial resources. Nevertheless, a divided panel of the Second Circuit vetoed this proposed delegation because of its supposed inconsistency with Title III itself. As the court recognized (App., *infra*, 3a), the question is of great practical importance to the administration of justice in the federal courts. Unfortunately, the court's prohibition of Judge Korman's initiative unjustifiably interferes with a legitimate effort to eliminate a burdensome, non-adjudicatory function from the heavy judicial workload, unduly constricting judicial delegation powers under the Magistrates Act. Moreover, the

court's statutory analysis is seriously flawed and in conflict with decisions of this Court.

Because the Second Circuit's decision turns on the relationships among several statutes, we briefly set forth the statutory background and before describing the opinions below.

A. Statutory Background

1. *Title III.* In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 112, codified as amended at 18 U.S.C. §§ 2510-21 (1988), Congress created a procedure by which the government may obtain authority to intercept wire and oral communications. The purpose of Congress in enacting this legislation was twofold: it wanted to protect the privacy of communications, while giving law enforcement officials the ability, consistent with constitutional standards, to tap telephone lines and use other forms of electronic surveillance in the investigation of major crimes. See S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2153.

Under 18 U.S.C. § 2516(1), the government may apply to a "Federal judge of competent jurisdiction" for an order authorizing or approving the interception of wire or oral communications. "Judge of competent jurisdiction" is defined in Title III as "a judge of the United States district court or a United States court of appeals." *Id.* § 2510(9). The legislative history makes clear that Congress limited the power to issue electronic surveillance orders to federal judges because of concern over the abilities of some of the officials, especially United States Commissioners, who were authorized to issue conventional search warrants:

> Existing Federal search warrant practice permits U.S. Commissioners and city mayors to issue warrants (18 U.S.C. 3041 (1964)). This practice is too permissive for the interception of wire or oral communications. Only

> judges of Federal district courts or courts of appeal should issue Federal warrants.

1968 U.S.S.C.A.N. at 2179.

2. *The Magistrates Act.* About three months after it passed Title III, Congress enacted the Federal Magistrates Act of 1968, Pub. L. No. 90-578, 82 Stat. 1107, codified as amended at 18 U.S.C. §§ 3401-3402, 28 U.S.C. §§ 631-639 (1988 & Supp. IV 1992). This statute abolished the office of United States Commissioner and replaced it with a judicial officer, the United States Magistrate, serving directly below the level of the district judge. Responding to concerns about commissioners' lack of legal expertise and part-time status, Congress imposed qualifications designed to ensure that magistrates (later renamed magistrate judges) were competent, professional, and impartial. 28 U.S.C. § 631. In particular, Congress specified that magistrates must be attorneys and must not hold any other office during their tenure, and it provided for selection of magistrates pursuant to a merit system. *Id.* §§ 631(b)(1), (b)(5), (c).

Congress also gave magistrates dramatically greater powers and responsibilities than commissioners had possessed. Magistrates were authorized to try minor offenses with the parties' consent and were empowered to perform such additional duties assigned by the district court as are "not inconsistent with the Constitution and laws of the United States." 82 Stat. 1113. Among the nonexhaustive list of "additional duties" prescribed by this section were service as a special master in a civil action, "assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions," and preliminary review of post-trial motions in criminal cases. *Ibid.*

In 1976, unhappy with a series of cases in which courts had construed narrowly the "additional duties" a magistrates could perform, Congress overhauled Section 636(b). The House Report noted that the purpose of the Magistrates Act

had been to "create[] a system of full-time and part-time judicial officers who would perform various judicial duties under the supervision of the district courts in order to assist the judges of these courts in handling an ever-increasing caseload." H.R. Rep. No. 1609, 94th Cong., 2nd Sess. 5 (1976) ("*1976 House Report*"), reprinted in 1976 U.S.C.C.A.N. 6162, 6164. The Report went on to emphasize "the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under the general supervision of the court, shall serve as an officer of the court * * * in the preliminary or pretrial processing of both criminal and civil cases * * * when assigned to the magistrate by a judge of the court." *Id.* at 6165.

To effectuate this broad role for magistrates, Congress amended Section 636(b)(1)(A) to provide that "[n]otwithstanding any provision of law to the contrary * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for eight enumerated matters not pertinent here. The House Judiciary Committee explained that the "notwithstanding" clause was "intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court'." *1976 House Report* 9. In language that is especially pertinent here, the Committee stated, "[i]t is * * * intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), 'notwithstanding any provision of law' referring to 'judge' or 'court'." *Ibid.* As for the pretrial matters magistrates were expected to hear and determine, the Committee made clear that the scope was to be extremely broad and limited only by the enumerated exceptions. See *Ibid.* ("the revised law * * * will clarify the broad authority to refer 'any pretrial matter'"); *id.* at 10 ("the revision * * * makes it clear that Congress intends that the magistrate shall have the power

to make a determination of any pretrial matter (except the enumerated dispositive motions)").

Congress did not disturb the "additional duties" clause, which provides that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." 28 U.S.C. § 636(b)(3). The Committee viewed this residuary clause as an extremely broad grant of power to district judges to delegate their functions: "Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'" *1976 House Report* 12. The Committee indicated its expectation that district judges would take advantage of magistrates' services, resulting in "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal court." *Ibid.*

B. Judge Korman's Order

1. On February 14, 1992, while Judge Korman was assigned to review applications for Title III electronic surveillance orders, he issued an order in which he announced that he would henceforth refer all such applications to United States magistrate judges. In an extensive memorandum opinion, Judge Korman explained his reasons for concluding that he had and should exercise the power to make such a delegation. *In re Applications of United States Attorney for Orders Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968*, 784 F. Supp. 1019 (E.D.N.Y.) (App., *infra*, 29a-48a).

Judge Korman was moved to take this action by the significant burden that review of Title III applications places on district judges. The applications are "long and prolix," often running into the hundreds of pages, and the judge must monitor the progress of the surveillance and review "equally

lengthy and prolix renewal applications" that are submitted when it is necessary to continue the surveillance after the expiration of the initial period of authorization. App., *infra*, 45a-46a. Because conscientious discharge of the authorization function is extremely time-consuming and can significantly burden the thoughtful and effective discharge of the federal judge's adjudicatory function, delegation of the function could improve both the quality and the speed of adjudications.

In finding that he possessed the power to delegate this task to a magistrate judge, Judge Korman relied primarily on the text and legislative history of the 1976 amendments to the Magistrates Act. He first noted that the amendments grew out of Congress's concern that certain judicial decisions had unduly limited the functions of magistrates under the 1968 statute by construing narrowly the "additional duties" (apart from specifically enumerated duties) they could perform. App., *infra*, 30a-31a. In Judge Korman's view, the 1976 amendments provided two separate sources of authority to refer Title III applications to magistrates: the "pretrial matters" clause (Section 636(b)(1)(A)) or the "additional duties" clause (Section 636(b)(3)).

Judge Korman observed that the principal objection to delegation derives from Title III's textual limitation of the judicial officers who could issue wiretap orders. But, he noted, the unambiguous language of the "pretrial matters" provision of the 1976 amendments expressly provided that such restrictions in existing statutes were no longer operative, because the power of delegation thereby recognized in the Magistrates Act applied "notwithstanding any provision of law to the contrary." App., *infra*, 31a-33a. Moreover, the concerns that motivated the restriction in Title III had been obviated by the fact that, unlike the commissioners they replaced, magistrate judges are well trained and highly competent legal professionals who "enjoy tenure, compensation and independence comparable to that of many state

judges who today issue orders pursuant to Title III." *Id.* at 38a.

In addition, Judge Korman concluded that the nature of the duties imposed on the judicial officer considering a Title III application and overseeing the execution of any surveillance that is authorized closely parallels the responsibilities entailed in passing upon conventional search warrant applications. This "makes it a particularly appropriate duty to assign to United States magistrate judges." App., *infra*, 45a. While Judge Korman recognized that electronic eavesdropping is potentially more invasive of privacy than many ordinary searches and seizures, he deemed it "unlikely that Congress intended that the same judicial officer it found competent to issue a warrant to arrest a person, to ransack his house, and seize his most private papers, [should] be denied the authority to entertain a motion for electronic eavesdropping upon the referral of a district court judge." *Id.* at 41a.

C. The Decision of the Court of Appeals

Judge Korman's action represented an important experiment in the use of magistrates to conserve scarce judicial resources. Nevertheless, the United States Attorney for the Eastern District of New York – perhaps concerned about the risk of suppression of evidence in a future criminal prosecution should it turn out that Judge Korman's delegation ruling was in error – sought an extraordinary writ, pursuant to 28 U.S.C. § 1651, to prohibit Judge Korman from delegating the application that was then pending before him. After directing Judge Korman to respond to the government's petition, the court of appeals dismissed the petition because no application was pending before Judge Korman at the time it acted.

Subsequently, another the Title III application (the one underlying this case) was presented to Judge Korman, who again ordered it referred to a magistrate. Rather than present the application to the magistrate, the government renewed its petition to the court of appeals for an extraordinary writ.

This time the court, recognizing that the question is one of great practical importance to the administration of justice in the federal courts (App., *infra*, 3a), addressed the merits and, by a divided vote, granted the government's petition.[1]

While acknowledging that the arguments in support of Judge Korman's reliance on the "pretrial matters" provision of the 1976 amendments and its "notwithstanding" clause were "substantial" (App., *infra*, 10a), the majority nevertheless rejected them on two grounds. First, it relied on the importance of the privacy interests implicated by electronic surveillance, which had led the Congress that enacted Title III in 1968 to limit approval authority for federal wiretaps to judges. In the majority's view, Title III was

> sui generis and * * * any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect.

App., *infra*, 10a. It accordingly distinguished the case at hand from others in which the broad power of district courts to delegate to magistrates such pretrial matters as the empaneling of grand juries and such additional duties as the conduct of extradition proceedings had been upheld. *Id.* at 11a, 13a.

Second, the majority relied on the interaction between Title III and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C. §§ 3121-3127 ("Privacy Act"). In the Privacy Act, Congress amended Title III to require law enforcement officers to obtain judicial authorization from a "court of competent jurisdiction" before employing pen regis-

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[1] Although the application that was the subject of the latest delegation order has not been re-presented to Judge Korman and may now be moot, this case is not. The Second Circuit's mandate orders Judge Korman, not only with respect to that application but generally, not to "delegate review of Title III applications to federal magistrate judges" in the future. App., *infra*, 50a-51a.

ters or trap-and-trace devices. 18 U.S.C. § 3122(a). The term "court of competent jurisdiction" was explicitly defined to include federal magistrate judges in the list of judicial officers authorized to review pen register applications. The majority attached great weight to the fact that, in enacting the Privacy Act, Congress "failed to amend Title III specifically to authorize magistrates to approve wiretapping orders." App., *infra*, 8a. Apparently treating this as a form of post-enactment legislative history for the 1976 amendments, the majority concluded that, by failing to amend Section 2510(9) of Title III to deal explicitly with wiretap authorizations by magistrates, Congress manifested an intent to continue restricting wiretap applications to judges. *Id.* at 10a-11a.

Finally, the majority saw a parallel between this case and *United States* v. *Giordano*, 426 U.S. 505 (1974), in which this Court held that the Attorney General could not delegate the power to authorize applications for Title III surveillance orders to his Executive Assistant despite a pre-existing general statute (28 U.S.C. § 510) giving broad powers of delegation to the Attorney General. The majority found *Giordano*'s strict construction of Title III instructive in the context of judicial delegation of authority to magistrate judges (App., *infra*, 11a-13a), even though, unlike the general delegation statute there at issue, the 1976 amendments both post-dated the enactment of Title III and expressly authorized delegation of pretrial matters "notwithstanding any provision of law to the contrary." 28 U.S.C. § 636 (b)(1)(A).

Judge Cardamone dissented. App., *infra*, 15a-28a. He did not deny the importance of the privacy interests at stake in electronic surveillance or the intent of Congress in adopting Title III to afford due protection to those interests, but he found those insufficient reasons to disregard the clear statutory directive contained in the 1976 amendments. Judge Cardamone first pointed out that Title III could not have mentioned magistrates because such an office did not exist

until later in 1968 when Congress passed the Magistrates Act. *Id.* at 16a.

Judge Cardamone stressed that Congress made clear in 1976 just how extensive it wanted the powers of magistrates to be. Against a background of deep concern over the restrictions placed on magistrates between 1968 and 1976, Congress used two particularly expansive phrases in the 1976 Amendments, authorizing judges to delegate to magistrates "any pretrial matter" and "such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. §§ 636(b)(1)(A), (b)(3). App., *infra*, 17a-18a. "Of equal importance" was the amended statute's introductory phrase, which made its provisions applicable "notwithstanding any provision of law to the contrary." Judge Cardamone read the legislative history to make plain that Congress intended the "notwithstanding" clause to modify all references throughout the U.S. Code to the authority of "the judge" or "the court." *Id.* at 18a.

Judge Cardamone concluded that referral of Title III wiretap applications clearly falls within the "pretrial matters" and "additional duties" clauses. First, the pretrial matters clause excepts eight categories of matters, but not wiretap applications. And the legislative history indicates that Congress intended arrest and search warrants – privacy intrusions as significant as wiretaps and involving similar determinations – to be delegable to magistrates under this clause. App., *infra*, 19a-22a.[2] Second, the residual "additional duties" clause is broad enough to cover Title III

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[2] In addition, the Second Circuit's decision in *United States* v. *Diaz*, 922 F.2d 998 (2d Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991), supported Judge Cardamone's position. The court there held that the empanelment of grand jurors – an act that, like review of a wiretap application, is not directly connected to any particular existing adversary proceeding – falls within the category of "pretrial matters." *Id.* at 1005.

applications and demonstrates Congress's intent that judges experiment with a wide variety of uses of magistrate judges as a means of narrowing the mandatory responsibilities of Article III judges to their core adjudicatory functions. *Id.* at 22a-25a.

REASONS FOR GRANTING THE PETITION

This case presents an issue of exceptional importance to the administration of justice, and worthy of this Court's consideration, for two reasons. First, the Second Circuit's prohibition of Judge Korman's initiative unjustifiably interferes with a legitimate effort to eliminate a burdensome non-adjudicatory function from the heavy judicial workload and unduly constricts judicial delegation powers under the Magistrates Act. Second, the court of appeals employed illegitimate techniques of statutory interpretation – such as using obscure intimations from a statute enacted in 1986 to alter the meaning of one enacted ten years earlier – to achieve this result, in the process substituting its judgment regarding the appropriateness of permitting magistrates to authorize electronic surveillance for the congressional election to commit such decisions to the discretion of the district judges.

A. This Issue Is Of Exceptional Importance Because The Ruling Below Impairs The Power Of District Judges To Utilize An Important Strategy To Relieve The Pressure Of Enormous Caseloads

As the court of appeals itself recognized, this case presents a question of such substantial importance as to justify its consideration of the merits of the government's petition for extraordinary relief, for "'the scope of a Magistrate's authority is a significant issue in federal criminal litigation.'" App., *infra*, 3a (quoting *In re United States*, 903 F.2d 88, 89 (2d Cir. 1990)). The court of appeals' ruling did nothing to diminish the importance of the issue.

Judge Korman's Order responds to a pressing need not only in the Eastern District of New York but throughout the federal court system to free district judges to focus on their ever-increasing load of civil and criminal cases. Yet the Second Circuit, employing dubious techniques of statutory interpretation and relying on an unduly restrictive view of the relevant legislative history, has prohibited district judges from delegating to highly competent magistrate judges the burdensome and time-consuming job of reviewing electronic eavesdropping applications that sometimes run into the hundreds of pages and overseeing any surveillance that is authorized. In an era in which the sheer volume of cases has made it difficult to promptly try civil and criminal cases and reduced the time available for the serious reflection, research and writing that are at the core of the judicial task, a ruling that curtails the power of district judges to delegate such routine matters raises extremely serious questions that deserve the attention of this Court.

Recent statistics on court filings graphically demonstrate the incredible workload under which district judges struggle and underscore the critical importance of allowing them to transfer to magistrates the responsibility for handling non-adjudicatory pretrial matters. Nationwide, the weighted caseload per judge was 416 for the year ended June 30, 1993. In the Eastern District of New York, where Judge Korman sits, the weighted caseload per judge was 571 for that period – seventh highest in the nation. See Administrative Office of the United States Courts, *Magistrate Judge Survey* 1, 3 (December 1993) ("*Magistrate Judge Survey*").[3] District judges nationwide held an average of 398 pending cases on their dockets at the end of June 1993, and judges in the

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[3] "Weighted" caseload takes into account additional factors that complicate a case, such as the number of criminal defendants. See *Magistrate Judge Survey* 3 n.2. The weighted caseload statistic reflects an average of cases filed during the fiscal year.

Eastern District averaged 637 pending cases – sixth highest in the country. *Id.* at 3. Although new civil filings decreased slightly nationwide between 1988 and 1991, they rebounded dramatically in 1992, increasing by 20,000 over the previous year. See Administrative Office of the United States Courts, *Annual Report of the Director* 4 (1992).[4] In many districts, new civil filings increased more than 20% between 1991 and 1992. Criminal cases continued the steady increase begun in 1981, leaving district judges with an average of 68 pending criminal cases each at the end of fiscal 1992, as compared to 50 each at the end of fiscal 1988. *Id.* at 6.

The problem of managing the rising federal caseload cannot satisfactorily be solved simply by adding new judges. To begin with, keeping authorized positions filled has not proven so easy. Of the 649 authorized district judgeships, 85 presently are vacant. In Judge Korman's district, three judgeships currently are unfilled. Perhaps more important, creating new judgeships is not a panacea; the Judicial Conference has consistently favored measured, incremental increases in the size of the federal judiciary. See Judicial Conference of the United States, *Preliminary Report on Judicial Conference Actions* 6 (Sept. 20, 1993); *Report of the Judicial Conference Committee on Long Range Planning* 6 (Sept. 1993); *Report of the Proceedings of the Judicial Conference of the United States* 93 (Sept. 1990). And, while proposals abound for restricting federal jurisdiction as a strategy for relieving the crisis, Congress shows few signs of scaling back the various statutes that help fuel the federal litigation explosion.

With the steady rise in caseloads, district judges have increasingly turned to magistrate judges to handle a wide variety of pretrial and other routine matters. In recent years,

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[4] Fiscal year 1992 is the last year for which complete nationwide statistics are available.

district judges have delegated responsibility for such functions as overseeing grand jury selection,[5] taking guilty pleas with the defendant's consent,[6] presiding over voir dire in felony cases with the defendant's consent,[7] determining whether parties and attorneys should be sanctioned,[8] conducting hearings for preliminary injunctive relief,[9] conducting extradition hearings,[10] reading the jury an *Allen* charge,[11] and ruling on motions to amend a complaint,[12] disqualify counsel,[13] or intervene.[14] These innovative uses of magis-

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[5] *United States* v. *Diaz*, 922 F.2d 998 (2d Cir. 1990), cert. denied, 111 S. Ct. 2035 (1991).

[6] *United States* v. *Williams*, ___ F.3d ___, No. 93-1224 (2d Cir. April 26, 1994).

[7] See *Peretz* v. *United States*, 111 S. Ct. 2661 (1991) (holding this practice consistent with the "additional duties" clause of the 1976 amendments).

[8] District courts have referred motions for discovery sanctions, see, *e.g.*, *Ocelot Oil Corp.* v. *Sparrow Indus.*, 847 F.2d 1458 (10th Cir. 1988), and Rule 11 sanctions, see, *e.g.*, *Maisonville* v. *F2 America, Inc.*, 902 F.2d 746 (9th Cir. 1990), cert. denied, 498 U.S. 1025 (1991).

[9] *Jeffrey S. by Ernest S.* v. *State Board of Educ.*, 896 F.2d 507 (11th Cir. 1990).

[10] *Austin* v. *Healey*, 5 F.3d 598 (2d Cir. 1993).

[11] *United States* v. *Sawyers*, 902 F.2d 1217 (6th Cir. 1990), cert. denied, 111 S. Ct. 2895 (1991).

[12] *Pagano* v. *Frank*, 983 F.2d 343 (1st Cir. 1993).

[13] *Affeldt* v. *Carr*, 628 F. Supp. 1097 (N.D. Ohio 1985).

[14] *Granato* v. *Sunn*, 594 F. Supp. 410 (D. Haw. 1984).

trate judges free district judges to devote more attention to the tasks that are essential to moving their overflowing dockets – handling trials, reviewing and deciding dispositive motions, presiding over pretrial and settlement conferences, and the like.

This Court frequently has recognized the role of magistrate judges in relieving district judges of less important responsibilities and keeping the dockets moving. See *Peretz* v. *United States*, 111 S. Ct. 2661, 2665 (1991) ("Congress intended magistrates to play an integral and important role in the federal judicial system"); *McCarthy* v. *Bronson*, 500 U.S. 136, 142 (1991) ("The central purpose of the 1976 amendment to the Magistrate's Act was to authorize greater use of magistrates to assist federal judges 'in handling an ever-increasing caseload.'") (quoting S. Rep. No. 94-625, 94th Cong., 2d Sess. 2 (1976)). Delegating review of Title III applications is consistent with the many other management strategies judges have employed to reallocate the judicial workload, because it relieves the district judge of a task for which magistrate judges are equally well (if not better) suited by training and experience.

The Title III authorization and oversight function is undeniably important, but it is one that may safely be placed in the competent hands of a federal magistrate judge. Put bluntly, it is a waste of time for federal judges, who by law are the only judicial officers empowered to perform the central tasks of the adjudicatory process,[15] to expend their

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[15] The Magistrates Act affirmatively prohibits magistrate judges from hearing and determining certain dispositive motions, such as motions for injunctive relief, motions for summary judgment, and motions to dismiss for failure to state a claim. 28 U.S.C. § 636(b)(1)(A). And the Court has observed that "the carefully defined grant [to magistrates] of authority to conduct trials of civil matters and of minor criminal cases should be construed as an implicit withholding of the authority to preside at a felony trial."

time reviewing long and complicated applications for electronic eavesdropping orders, monitoring the progress of the surveillance, and reviewing applications for renewal. These tasks, moreover, are closely akin to the determinations of probable cause or appropriate scope of search that are part of the everyday responsibilities of magistrate judges in passing upon applications for conventional search warrants.

Furthermore, the concerns that caused Congress in 1968 to restrict to judges the power to pass upon Title III applications have long since been eliminated. The standards that govern the office of magistrate judge and the system of selection and retention ensures that the persons who fill the position possess qualifications and abilities akin to Article III judges. Unlike the former U.S. Commissioners, magistrate judges are appointed by a majority of the district judges in a district for a term of eight years, and may be removed only for cause. 28 U.S.C. §§ 631(e), (i). They must be attorneys and may not hold any other office during their tenure. *Id.*, §§ 631(b)(1), (c). Congress required that the Judicial Conference of the United States establish standards for selection, including the establishment of merit selection panels to assist in identifying the best qualified persons. *Id.*, §

Gomez v. *United States*, 490 U.S. 858, 872 (1989). Thus, most important adjudicatory functions *must* be performed by Article III judges. Furthermore, although magistrate judges may preside over minor criminal matters and civil trials, the requirement that the parties give their consent (see 18 U.S.C. § 3401(b); 28 U.S.C. § 636(c)(1)) functions as a practical limitation on their ability to relieve district judges of these tasks. In addition, the Court has made clear that judicial tasks that are not specified in the statute, but that are not like the "subsidiary matters" magistrates may perform over the parties' objections, also require the parties' consent before a magistrate may preside. See *Gomez*, 490 U.S. at 860, 872 (magistrate may conduct voir dire in felony case only if defendant consents).

631(b)(5). Those standards provide that magistrate judges must be selected from among nominees found by the merit selection panels to "possess the same types of personal and professional qualities expected of district judges." Administrative Office of the United States Courts, *The Selection and Appointment of United States Magistrates* 10, 12-13 (1987).

This Court has observed that in the years since Congress created the new office of magistrate, the responsibilities of magistrates have steadily expanded while Congressional concern over their abilities has diminished. See *Gomez* v. *United States*, 490 U.S. 858, 865-871 (1989). As Judges Korman and Cardamone pointed out, there is no sound reason why judicial officers who are entrusted to issue warrants empowering government officials to conduct arrests, searches and seizures would not be sensitive to the privacy concerns that are implicated by electronic surveillance. The "neutral and detached" judgment on the issue of probable cause that provides the necessary Constitutional safeguard prior to the authorization of electronic surveillance, *United States* v. *United States District Court*, 407 U.S. 297, 316-317 (1972), plainly can be exercised by magistrate judges.

The Second Circuit's opinion is likely to chill the very experimentation with the use of magistrate judges that Congress envisioned when it expanded magistrates' roles in 1976. Its decision blocking delegation of Title III authorization and oversight functions raises questions that demand further review.

B. The Use Of The 1986 Privacy Act To Alter The Meaning Of The 1976 Magistrates Act Amendments Conflicts With Accepted Principles Of Statutory Construction

Because Judge Korman's thorough opinion explains why the 1976 amendments to the Magistrates Act authorizes magistrate judges to pass upon Title III wiretap applications (see App., *infra*, 31a-43a), we will not repeat those points

here. We will, however, briefly demonstrate why the Second Circuit's reliance on the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 ("Privacy Act") to establish the illegality of delegating Title III wiretap review was a misguided statutory analysis with potentially far-reaching consequences for future statutory interpretation cases.

In the Privacy Act, Congress took action to regulate law enforcement use of pen registers and trap-and-trace devices, requiring that, before such telephone monitoring devices could be used, permission be obtained from a "court of competent jurisdiction," which it defined to include magistrates. 18 U.S.C. § 3122(a). The panel majority placed great – and, we respectfully submit, illegitimate – weight on the fact that the Privacy Act did not simultaneously specify that eavesdropping applications under Title III (a subject with which the legislation was not concerned) could also be authorized by magistrates. This omission demonstrated to the panel majority that Congress understood that function to be performable only by Article III judges and intended to continue that limitation in force. App., *infra*, 11a.

This use of the 1986 Privacy Act to define the relationship between Title III and the 1976 amendments to the Magistrates Act conflicts with established principles of statutory construction. This Court has demanded the greatest caution in using subsequent legislative materials to interpret earlier statutes. See *Russello* v. *United States*, 464 U.S. 16, 26 (1983); *United States* v. *Price*, 361 U.S. 304, 313 (1960). The panel ignored this well-known canon of construction when it relied on Congress's failure in the Privacy Act to alter Title III's list of judicial officers authorized to review wiretap applications. But as Judge Cardamone pointed out (App., *infra*, 26a), what Congress did *not* do when amending Title III in 1986 is hardly a basis for divining the intent of earlier legislation allocating authority between district judges and magistrate judges. Indeed Congress, which was not

otherwise amending the wiretap provisions of Title III in 1986, had no need to add magistrate judges to the list of officials empowered to review wiretap applications because it had already done so by the "notwithstanding" clause of the Magistrates Act.[16]

In demanding specific Congressional authorization for magistrate judges to review wiretap applications, the panel elevated ill-defined "privacy" concerns implicated by Title III over statutory language and legislative history that unambiguously permits a delegating judge to ignore the literal meaning of the terms "court" or "judge" in prior grants of authority. In effect, the panel decided that it need not take seriously the "notwithstanding" clause if it found reasons why a task originally delegated to an Article III judge should remain with that judicial officer. In so doing, it arrogated to itself the power to decide what delegations to magistrate judges are

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[16] The panel's heavy reliance on *United States* v. *Giordano*, 426 U.S. 505 (1974), is similarly inappropriate, as well as unconvincing. In *Giordano*, the Court held that, despite a statute (28 U.S.C. § 510) that generally authorized the Attorney General to delegate functions to other officials, Title III's specification of the Justice Department officials who could authorize wiretap applications precluded a delegation to the Attorney General's Executive Assistant. 426 U.S. at 513. But *Giordano* is different from this case in a critical respect: although the Attorney General's delegation power was analogous to the power of district judges to delegate under the Magistrates Act, it *predated* Title III's specific enumeration of the persons to whom the Attorney General could delegate the power to seek wiretap authorizations. Here, by contrast, the broad delegation power of the Magistrates Act *postdates* Title III's specific reference to district judges and *expressly* nullifies that limitation by the "notwithstanding" clause. As Judge Cardamone pointed out (App., *infra*, 27a), the court of appeals majority simply ignored the intent of Congress in including a broad "pretrial matters" clause in the 1976 amendments.

appropriate, thereby overriding the congressional assignment of such powers to the district judges.

Apart from the methodological impropriety of the majority's use of the 1986 Privacy Act, the inference it draws from that legislation is entirely unfounded. As Judge Cardamone cogently explained in his dissent (App., *infra*, 27a), while Congress in 1976 quite clearly contemplated that the "notwithstanding" clause would authorize magistrates to perform functions that then-existing statutes limited to judges, it was not necessarily writing a blank check with respect to later-enacted statutes that might contain similar limitations. Thus, a later Congress could neither rely on the "notwithstanding" clause nor simply incorporate the definition in Section 2510(9) if it wished to make clear that the functions it was addressing in 1986 could be performed by magistrate judges. Rather, it would have to delineate explicitly the judicial officers it was empowering to perform the task. The inclusion of magistrate judges in the 1986 Act's definition of "court of competent jurisdiction," which merely made clear Congress' intent to allow magistrate judges to review pen register applications, therefore affords no hint as to the meaning of the 1976 legislation or its effect on the wiretap portion of Title III.

In sum, the panel majority's crabbed reading of the "notwithstanding" clause represents a troublesome and unjustified use of post-enactment legislative actions to alter the otherwise clear meaning of earlier legislation, and it stands as precedent for ignoring the "notwithstanding" language altogether if a court finds countervailing interests that require the attention of an Article III judge. This decision deserves further review, especially in light of the importance of the issue presented in this case to the administration of justice in the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1994

APPENDIX A

In re UNITED STATES of America, Petitioner.

No. 520, Docket 93-3074.

United States Court of Appeals,
Second Circuit.

Argued Sept. 3, 1993.

Decided Nov. 23, 1993.

Before: FEINBERG, CARDAMONE and ALTIMARI, Circuit Judges.

FEINBERG, Circuit Judge:

The United States petitions under the All Writs Act, 28 U.S.C. § 1651, and Rule 21 of the Federal Rules of Appellate Procedure for a writ of mandamus to the United States District Court for the Eastern District of New York, Edward R. Korman, J. The petition requests a determination of the authority of a district court to delegate to a federal magistrate judge the power to review applications by law enforcement officials for orders authorizing electronic eavesdropping pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2521 (Title III). The petition requests, in the alternative, an order directing respondent Judge Korman to review such applications personally. For the reasons set forth below, we grant mandamus and order respondent Judge Korman not to delegate review of Title III applications to federal magistrate judges and to review personally an application now pending.

I. Background

In February 1992, respondent Judge Korman was serving in the Miscellaneous Part of the district court, where he was responsible for the review of applications for Title III orders. By an opinion and order dated February 14, 1992, respondent

announced his intention to refer all such applications to United States magistrate judges. *See In re United States Attorney*, 784 F.Supp. 1019, 1028 (E.D.N.Y.1992). At the request of the United States, however, Judge Korman stayed implementation of his order until October 10, 1992[1] and signed the then pending Title III application of the United States Attorney for the Eastern District of New York. The United States then petitioned this court for mandamus review of Judge Korman's order. This court denied the petition in an order dated March 23, 1993. Upon the United States' motion for clarification, the order was modified on June 14, 1993 to state that the petition was denied because no application had been referred to a magistrate.

On June 30, 1993, Judge Korman referred another application by the United States Attorney to a magistrate judge. The United States now seeks mandamus review of this order. This court accepted briefs from the parties and heard oral argument.[2]

II. Availability of Mandamus

This court's order of March 23, 1993, as modified June 14, 1993, denied petitioner's earlier mandamus petition because there was no wiretap application then pending before a magistrate judge. Because such an order is now pending, the issue has become ripe for review.

Mandamus is an extraordinary remedy that this court does not grant lightly:

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[1] This was the next date on which respondent expected to serve in the Miscellaneous Part.

[2] Because the issues were fully briefed at the time of the prior application for mandamus, the parties resubmitted and relied upon those briefs.

> the petitioner must show (1) the presence of a novel and significant question of law; (2) the inadequacy of other available remedies; and (3) the presence of a legal issue whose resolution will aid in the administration of justice.

In re United States, 903 F.2d 88, 89 (2d Cir.1990) (citing *In re Von Bulow*, 828 F.2d 94, 97-100 (2d Cir.1987)). We find that the petition by the United States meets these stringent criteria.

First, the case presents a novel and significant issue. Respondent appears to be the only judge in this circuit, if not in the nation, to delegate the review of Title III orders to a federal magistrate judge. As for significance, this court has recognized that "the scope of a Magistrate's authority is a significant issue in federal criminal litigation." *In re United States*, 903 F.2d at 89. Moreover, the disposition of applications for wiretapping orders implicates serious issues of privacy under the Fourth Amendment.

Second, petitioner has no alternative remedies capable of effectively protecting its substantial interests. Electronic surveillance involves major criminal investigations and requires a significant expenditure of government resources. Petitioner thus has a strong interest in ensuring the admissibility of evidence it gathers by electronic surveillance. Suppression on the ground that surveillance was authorized by an invalid Title III order would result in a significant waste of government resources. Furthermore, the government as *parens patriae* has an interest in avoiding illegal invasions of its citizens' privacy.

Moreover, because of the unusual procedural posture of this proceeding, petitioner has no other adequate remedy. If petitioner is unable to obtain review of the basic legal issue now, presumably either the pending Title III application or another one referred by respondent to a magistrate in the future will be approved by a magistrate and petitioner will

proceed with a criminal investigation. If an indictment results, the defendant, of course, would have the right to move to suppress any evidence obtained through the wiretap. Petitioner would then be placed in the impossible situation of either agreeing with defendant that the wiretap was not properly authorized or of taking a legal position that it believes is incorrect. Cf. *In re United States*, 903 F.2d 88.

Finally, resolution of this issue will aid in the administration of justice. Mandamus is appropriate "when the appellate court is convinced that resolution of an important, undecided issue will forestall future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." *In re Von Bulow*, 828 F.2d at 99 (quoting *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524 (D.C.Cir.1975)). In this case, mandamus will eliminate uncertainty as to the delegation of Title III review, thus avoiding future challenges to wiretapping orders approved by magistrate judges, which may require retrial or the suppression of evidence.

III. The Merits

We turn now to the merits of the case. Whether district judges may delegate the review of Title III orders to magistrate judges depends ultimately upon the congressional intent expressed in Title III and in the Federal Magistrates[3] Act, Pub.L. No. 90-578, 82 Stat. 1107 (codified as amended at 28 U.S.C. §§ 631-639). In analyzing this issue, however, another statute is highly relevant, as will be seen below.[4]

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[3] In 1990, the name of the office of United States magistrate was changed to "United States magistrate judge." This opinion uses the terms interchangeably.

[4] The parties have not raised, nor do we address, any constitutional issues involved in the delegation of Article III judges' duties to magistrate judges. We note that the Supreme Court has avoided

A. *Relevant statutes*

The 90th Congress enacted Title III in June 1968. The statute requires law enforcement officers seeking permission to intercept wire, oral or electronic communications to apply in writing to a "judge of competent jurisdiction." 18 U.S.C. § 2518(1). The statutory definition of that term includes only "a judge of a United States district court or a United States court of appeals" and "a judge of any court of general criminal jurisdiction of a State," who is authorized by state law to enter wiretapping orders. 18 U.S.C. § 2510(9). Title III contains a number of provisions designed to tightly control the use of this prosecutorial tool and to safeguard the privacy interests of those subjected to a wiretap. See generally *United States v. Giordano*, 416 U.S. 505, 514-23, 94 S.Ct. 1820, 1826-30, 40 L.Ed.2d 341 (1974). For example, an application for a wiretap order must be authorized by the Attorney General or her designees, see 18 U.S.C. § 2516(1), and must be made in writing, under oath, with a statement of the applicant's authority. See 18 U.S.C. § 2518(1)(a). It must also include the identity of the law enforcement officer making the application and provide a complete statement of the facts relied upon. See 18 U.S.C. §§ 2518(1)(a)-(e). Furthermore, the right to intercept is confined to seeking evidence of only certain specified serious offenses. See 18 U.S.C. § 2516(1)(a)-(o). In addition, there are stringent restrictions on the use and disclosure of the evidence obtained. The statute specifies safeguards relating to recording, minimizing and sealing the interceptions, as well as notice requirements to intercepted parties. 18 U.S.C. § 2518(8)(a), (b), (d). Violations of 18 U.S.C. §§ 2510 et seq. are

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constitutional issues in this area by construing the Federal Magistrates Act narrowly "in light of its structure and purpose." *Gomez v. United States*, 490 U.S. 858, 864, 109 S.Ct. 2237, 2241, 104 L.Ed.2d 923 (1989) (citing cases).

punishable by imprisonment of up to five years and a fine of $10,000. 18 U.S.C. §§ 2511(4)(a), 2512(1).

The Federal Magistrates Act was enacted in October 1968 during the same session in which Congress enacted Title III. The statute replaced the office of United States commissioner with that of federal magistrate and gave the latter all the powers theretofore exercised by the former. See Pub.L. No. 90- 578, § 636(a)(1) (codified at 28 U.S.C. § 636(a)(1)). In addition, the statute specifically listed further powers of the newly created magistrates. See id. at §§ 636(a)(2) and (3) (codified as amended at 28 U.S.C. §§ 636(a)(2) and (3)). Commissioners had not been authorized to issue Title III orders, and the list enumerating powers of magistrates did not include any reference to the Title III wiretap approval procedure Congress had just created a few months before. The statute did, however, authorize a district court to assign to magistrates "such additional duties as are not inconsistent with the Constitution and laws of the United States," id. at § 636(b), including but not restricted to "assistance to a district judge in the conduct of pretrial ... proceedings in ... criminal actions." Id. at § 636(b)(2).

In 1976, the Magistrates Act was amended to expand the powers of magistrates. Section 636(b) was changed to read, in relevant part, as follows:

(b)(1) *Notwithstanding any provision of law to the contrary--*

> (A) a judge may designate a magistrate to hear and determine *any pretrial matter* pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

. . . . .

(3) A magistrate may be assigned *such additional duties as are not inconsistent with the Constitution and laws of the United States*. (emphasis supplied).

Pub.L. No. 94-577, 90 Stat. 2729 (codified as amended at 28 U.S.C. § 636(b)).

Finally, in 1986, Congress passed the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 3121-3127) (the Privacy Act). This Act amended Title III by requiring law enforcement officers wishing to employ "pen register" or "trap and trace" monitoring devices[5] to seek permission from a "court of competent jurisdiction." See 18 U.S.C. § 3122(a). Unlike the definition of "judge of competent jurisdiction" in the wiretapping provisions of Title III, the definition of "court of competent jurisdiction" in the Privacy Act specifically includes federal magistrates. See 18 U.S.C. § 3127(2)(A).

In contrast to the provisions of Title III regarding wiretaps, a pen register or trap and trace application does not require authorization from the Attorney General or her designee. The application need only identify the applicant and the investigating law enforcement agency and certify that "the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by that agency." 18 U.S.C. § 3122(b)(2). The provision was not intended to require independent judicial review of relevance; rather, the reviewing court need only verify the completeness of the certification. See S.Rep. No. 541, 99th Cong., 2d Sess. 47 (1986), reprinted in 1986 U.S.C.C.A.N. 3555, 3601. Moreover, the maximum prison term for violation of the pen

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[5] These devices are used to identify numbers dialed to or from a telephone, but do not allow eavesdropping on conversations.

register or trap and trace provisions is only one year, 18 U.S.C. § 3121(c), compared to the five-year prison term authorized for violation of the wiretap provisions of Title III. 18 U.S.C. § 2511(4)(a).

B. *Discussion*

Petitioner United States argues that magistrates have not been authorized to approve wiretapping orders, either by Title III or by the Magistrates Act, as first enacted in 1968, or by the 1976 amendment of § 636(b). Petitioner is aware, of course, that as far back as 1968, district courts could assign to a magistrate "such additional duties as are not inconsistent with the Constitution and laws of the United States," including assisting the judge in pretrial proceedings in criminal cases, and that since 1976 such assignment has been permissible "in any pretrial matter" (with specified exceptions not applicable here), "notwithstanding any provision of law to the contrary." Petitioner argues, however, that this general language does not allow the delegation to magistrates at issue here. Petitioner emphasizes that Title III, as initially passed in 1968, specifically gave the power to approve wiretap applications only to federal district judges, federal circuit judges and state judges empowered by state statute to issue eavesdropping orders and that the 1986 Privacy Act amended the definition section of Title III, 18 U.S.C. § 2510, in many respects but not with respect to the issue raised here.

These are strong arguments. The Privacy Act explicitly authorized magistrates to approve pen register and trap and trace methods of surveillance, but failed to amend Title III specifically to authorize magistrates to approve wiretapping orders. If Congress in 1986 had believed magistrates to be "judge[s] of competent jurisdiction," as the term is used in Title III, 18 U.S.C. § 2510(9), who are authorized to issue wiretapping orders, then the Privacy Act could have empowered magistrates to issue pen register orders with a simple reference back to § 2510(9). Instead, however, the 1986

Privacy Act specifies persons empowered to authorize pen register orders by reference to a separate "court of competent jurisdiction" section, which, unlike § 2510(9), specifically includes magistrates. See 18 U.S.C. § 3127(2)(A).

In response, respondent argues primarily that the 1976 amendment to the Magistrates Act authorized a district judge to delegate "any pretrial matter"[6] (with specified exceptions not applicable here) to a magistrate, "notwithstanding any provision to the contrary." Respondent points to the House Report on the 1976 amendment, which stated that the language just quoted "is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court' " and that therefore "the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), 'notwithstanding any provision of law' referring to 'judge' or 'court'." H.R.Rep. No. 1609, 94th Cong., 2d sess. 9 (1976), reprinted in 1976 U.S.C.C.A.N. 6162, 6169. With regard to the 1986 Privacy Act, respondent claims that it specifically authorized magistrates to approve pen registers and not wiretapping because the 1986 Act, unlike the original Title III, post-dated both the Magistrates Act and the amend-

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[6] While we assume arguendo that the review of Title III wiretapping orders is a "pretrial matter" within the meaning of 28 U.S.C. § 636(b)(1)(A), it is at least arguable that this is not so because the review may occur long before any proceeding in court. This, of course, may also be true of applications for a search warrant, which magistrates are undoubtedly authorized to issue. See Fed.R.Crim.P. 41(a). But that power does not stem from the 1976 amendment of the Magistrates Act, upon which respondent so heavily relies. Rather, search warrant authority resided with United States commissioners, the predecessors of federal magistrates, since before the 1968 Magistrates Act. See S.Rep. No. 1097, 90th Cong., 2d sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2179 (citing former 18 U.S.C. § 3041 (1964)).

ment of that Act in 1976. The Privacy Act's amendments in 1986 of the definitions in Title III did not authorize magistrates to issue wiretapping orders, respondent argues, because the 1976 Magistrates Act had already done so.

These are substantial arguments, particularly the former which relies on the 1976 amendment to the Magistrates Act. Yet, we are left with the strong conviction that Title III is sui generis and that any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect. It must be remembered that Congress passed Title III in 1968 only after "a long battle between those who would have altogether prohibited wiretaps and the material obtained thereby and those who wanted to allow the government to use wiretap material in criminal prosecutions." United States v. Gerena, 869 F.2d 82, 84 (2d Cir.1989) (citing *National Broadcasting Co. v. United States Dept. of Justice*, 735 F.2d 51, 53 (2d Cir.1984)). Title III was not enacted simply to facilitate electronic surveillance by law enforcement agencies. To the contrary, this court has noted that because "Congress recognized that wiretapping could be highly intrusive of privacy," the statute placed strict limits on the use of wiretapping. *Gerena*, 869 F.2d at 84; see also *National Broadcasting Co.*, 735 F.2d at 53 (citing S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 161-65, reprinted in 1968 U.S.C.C.A.N. 2112, 2154-56, 2222-27). Title III was intended to "properly protect the privacy of oral and wire communications, while providing a uniform basis for authorizing their interception in appropriate cases." *United States v. Bianco*, 998 F.2d 1112, 1120 (2d Cir.1993).

In view of this background, the interaction between Title III and the 1986 Privacy Act supports our view that magistrates have not been authorized to approve wiretap applications under Title III. It is significant that the Privacy Act changed the definition section of Title III in many respects, but did not alter § 2510(9), which grants the power to

approve wiretaps only to federal Article III judges and state judges having general criminal jurisdiction and state statutory authorization. It is also significant that the 1986 Act specifically authorized magistrates only to approve pen register and trap and trace monitoring, invasions of privacy far less intrusive than wiretapping. There is a sharp contrast between the stringent controls over wiretap orders (including the severity of punishment enforcing them) and the much less onerous conditions for obtaining pen register and trap and trace authorization. We believe that Congress in 1986 saw pen register and trap and trace monitoring, which magistrates may authorize, to be qualitatively different from wiretapping, which only an Article III federal judge or a state court judge of general criminal jurisdiction may authorize.

Respondent relies heavily on this court's decision in *United States v. Diaz*, 922 F.2d 998 (2d Cir.1990), cert. denied, --- U.S. ---, 111 S.Ct. 2035, 114 L.Ed.2d 119 (1991), in support of the view that the order under attack here is valid. In that case, we interpreted the "notwithstanding" language in the 1976 amendment of the Magistrates Act as implicitly authorizing magistrates to empanel grand juries, even though the Jury Selection and Service Act, 28 U.S.C. § 1865(a), gives that authority only to district judges. *Diaz*, 922 F.2d at 1002. *Diaz*, however, did not involve the important privacy interests affected by Title III.

The purpose and legislative history of Title III suggest caution in allowing delegation of authority conferred by that statute. The Supreme Court relied on such a view of Title III in *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), a case strikingly similar to the case at hand. *Giordano* involved 18 U.S.C. § 2516(1), which then provided that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application" for a wiretap order. The Court held that § 2516 did not allow the Attorney General to delegate the power to authorize applications to the

Attorney General's Executive Assistant, even though the Attorney General was authorized by a different statute to delegate any of her functions to "'any other officer, employee, or agency of the Department of Justice.'" Giordano, 416 U.S. at 513, 94 S.Ct. at 1826 (quoting 28 U.S.C. § 510).

Just as Title III empowers "a judge of competent jurisdiction" to review applications, 18 U.S.C. § 2518(1), it empowers the Attorney General to authorize applications. See 18 U.S.C. § 2516(1). And, just as 28 U.S.C. § 636(b), the 1976 amendment of the Magistrates Act, allows district judges to delegate "any pretrial matter" and "additional duties," 28 U.S.C. § 510 allows the Attorney General to delegate any of her functions. The *Giordano* Court held, nonetheless, that even though Title III included no "precise language forbidding delegation ...[,] § 2516(1), *fairly read*, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." 416 U.S. at 514, 94 S.Ct. at 1826 (emphasis supplied).

The *Giordano* Court based its holding on the purpose and the legislative history of Title III, fairly read. The same approach also supports the view that Congress wanted to limit the power to review applications to specified judicial officers.[7] The purpose of Title III was to outlaw wiretapping except in certain situations, as indicated by the strict restrictions on the gathering and use of wiretap evidence. See id.

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[7] Respondent has attempted to distinguish Giordano on the ground that the Attorney General's power to delegate authority under 28 U.S.C. § 510 predated Title III, while the Magistrates Act post-dated Title III. See *In re U.S. Attorney*, 784 F.Supp. at 1022. Thus, it could be argued that § 510 could not empower the Attorney General to delegate her Title III authority, because when § 510 was enacted, she had no Title III authority. *Giordano*, however, did not rely upon, or even mention, the timing of § 510. Rather, it relied entirely on a close examination of Title III.

at 514-16, 94 S.Ct. at 1826-27. Those statutory restrictions should be observed in the absence of specific Congressional direction to the contrary.

The present case also stands in contrast to our recent decision in *Austin v. Healey*, 5 F.3d 598 (2d Cir.1993), in which we approved a court rule automatically delegating extradition proceedings to magistrate judges. That case involved neither privacy issues nor judicial inference as to Congressional intent, for Congress has specifically stated that magistrates may hear extradition proceedings if "'authorized so to do by a court of the United States.'" *Id.*, at 601 (quoting 18 U.S.C. § 3184). Furthermore, before the Magistrates Act, Congress had authorized extradition proceedings, unlike wiretap applications, to be heard by United States commissioners, id., at 603, so that the Magistrates Act in that respect merely codified prior practice.

It may also be argued that since magistrates have the authority to issue search warrants, which obviously intrude upon privacy interests, Congress must have intended in the 1976 amendments to the Magistrates Act to allow magistrates to approve wiretap applications. But here, too, United States commissioners were empowered to issue search warrants even before Title III was enacted, see supra n. 6, so that no such inference is justifiable. Indeed, the Senate Report on the legislation that became Title III specifically pointed out that the prior practice of commissioners with regard to such warrants had been "too permissive for the interception of wire or oral communications," and that the power to authorize electronic surveillance should be more limited. S.Rep. No. 1097, reprinted in 1968 U.S.C.C.A.N. 2112, 2179.

Our dissenting brother asserts that a wiretap is not "more intrusive on personal privacy" than a judicially-authorized search. We disagree. A wiretap may capture the intimate details of a person's life over an extended period of time without that person's knowledge. In contrast, a search

pursuant to a warrant, which has long been a recognized tool of the prosecutor, occurs just once and, by its nature, puts the person searched on notice of the violation of privacy. A wiretap is like a continuous film of events in your home, secretly recorded over a period of weeks or months. A search is like a surprise snapshot of your home taken in your presence. The former is obviously a far greater invasion of privacy than the latter. The lengthy battle in the 1960's leading to enactment of Title III is proof enough that Congress considered the comparatively new technique of electronic eavesdropping to be far more intrusive than the familiar search pursuant to a warrant.

Finally, we do not doubt that the 1976 amendment of the Magistrates Act was intended, as respondent urges, to overcome a series of court decisions that had construed that Act narrowly to limit the "additional duties" that could be delegated to magistrates. H.R.Rep. No. 1609, reprinted in 1976 U.S.C.C.A.N. 6162, 6164-67, 6173. But one can search the House Report in vain for disapproval of a decision refusing to allow a magistrate to hear wiretap applications. Indeed, apparently no one thought that the power existed, since even respondent concedes that no district judge has ever delegated the review of a Title III application to a magistrate before.

In enacting the 1968 Magistrates Act, the 1976 amendment to that Act and the 1986 Privacy Act amendments to Title III, Congress had multiple opportunities to add magistrate judges specifically to the category in Title III of "judge of competent jurisdiction," but in each instance did not do so. We are aware of the growing burdens placed upon the district courts and appreciate the valuable assistance furnished to the judicial system by magistrate judges. But in enacting Title III, Congress showed great concern for protecting individual privacy against the vast potential for intrusion posed by wiretapping. In sum, we are unwilling, in the absence of explicit statutory direction, to expansively interpret Title III's

definition of a "judge of competent jurisdiction," 18 U.S.C. § 2510(9), to include magistrate judges.

Mandamus granted.

CARDAMONE, Circuit Judge, dissenting:

The majority concludes that the Federal Magistrates Act does not authorize district courts to refer electronic eavesdropping applications, made under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-2521 (Title III), to a United States magistrate judge. In effect, the majority asks "why" should the magistrate judges have this authority. Were Congress asked this question, and it is that body's legislative purpose which purports to be our guide, its answer would be, I am persuaded, "why not?" While the issue presents a close question of statutory interpretation, clearly the statutory scheme, the genealogy of Title III amendments, and the legislative history of the Magistrates Act, Pub.L. No. 90-578, 82 Stat. 1107 (codified as amended at 18 U.S.C. §§ 3401-02; 28 U.S.C. §§ 631- 39 (1988)), make plain the legislative aim to experiment in the broader use of magistrate judges in order to free Article III judges to perform their adjudicatory function. For reasons stated in a moment, I therefore respectfully dissent.

DISCUSSION

I

It is plain that Congress was deeply concerned about individual privacy rights as reflected in the debates leading up to the enactment of Title III in June 1968. Once Congress decided to authorize this intrusion through the use of a wiretap, the issue of privacy was resolved and the only question that remained was which judicial officers would have the authority to order a wiretap. It is our differing views on the answer to that question that prompts this dissent.

The statute, 18 U.S.C. § 2518(1), requires all wiretap applications to be submitted in writing to a "judge of competent jurisdiction," defined as: "(a) a judge of a United States district court or a United States court of appeals; and (b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter [wiretap] orders." 18 U.S.C. § 2510(9).

At the time § 2510(9) was drafted and enacted, Congress could not have included magistrates in the definition because magistrates did not then exist. Commissioners, who were not required to be lawyers, were their ostensible equivalent, and Congress did not deem commissioners capable of judiciously reviewing wiretap applications. See S.Rep. No. 1097, 90th Cong.2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179. In fact, Congress did not believe commissioners were competent in the duties they were authorized to perform, such as review of applications for and authorization of search and arrest warrants. *See* H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255-56.

In response to this perceived inadequacy, four months after the passage of Title III, Congress enacted in October 1968 the Federal Magistrates Act. With the creation of the office of the United States magistrate, Congress abolished the office of commissioner. Magistrates were vested with all the authority previously held by commissioners, along with greatly expanded duties designed to "increase[ ] the overall efficiency of the Federal judiciary, while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4257.

To address the deficiencies of the commissioners, Congress required, *inter alia*, magistrates to be members of the bar wherever possible. *See* 28 U.S.C. § 631(b)(1). This was

prompted, in part, to insure "both the accused and the legal system of an independent determination of the question of probable cause." *Id.* at 4256. Congress obviously could have modified § 2510(9) and expressly extended to magistrates the authority to authorize Title III wiretaps. Perhaps it was thought unnecessary in light of the Magistrates Act itself. No time need be spent speculating on this because in 1976 Congress made clear how it desired magistrates to be used in our judicial system.

II

As the legislative history of the 1976 amendments to the Magistrates Act demonstrates, Congress was troubled by a series of court decisions that construed the Magistrate's Act narrowly, stifling the greater use of magistrates by the district courts. *See* H.R.Rep. No. 1609, 94th Cong., 2d Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6166. The amendments accordingly reorganized the Magistrates Act in an attempt to clarify and further define the additional duties that may be assigned a magistrate. *See Gomez v. United States*, 490 U.S. 858, 867, 109 S.Ct. 2237, 2243, 104 L.Ed.2d 923 (1989). The revised § 636(b) reads, in relevant part, as follows:

> (b)(1) Notwithstanding any provision of law to the contrary--
>
> (A) a judge may designate a magistrate *to hear and determine any pretrial matter* pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.
>
> . . . . .

> (3) A magistrate may be assigned *such additional duties* as are not inconsistent with the Constitution and laws of the United States. (Emphasis added).

For purposes of the instant appeal, the two underlined clauses of § 636(b)--the "pretrial matters" and the "additional duties" clause--are in my view the source of authority permitting a magistrate judge to review a wiretap application and authorize its issuance. Of equal importance is the statute's lead-in sentence, that reads: "Notwithstanding any provision of law to the contrary--." Its significance will be addressed first.

This sentence modifies the pretrial matters and additional duties clauses, and was included in order to resolve issues like that presented on this appeal, that is, whether a district judge may validly refer to a magistrate judge a task statutorily assigned to the district judge. As both the Senate and House Judiciary Committees explained:

> The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary--". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of these terms to read "the judge or a magistrate." It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."

S.Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R.Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169. Given this plain expression of legislative purpose, the language of § 2510(9) is modified by § 636(b) so as to allow a district judge to refer a Title III application to a magistrate judge, provided the referral is

encompassed by a specific authorization in the remainder of § 636(b).

Authority for such reference, it seems to me, falls within the orbit of either the pretrial matters clause or the additional duties clause because overall "[t]he Act is designed to relieve the district courts of certain subordinate duties that often distract district courts from more important matters." *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 2668, 115 L.Ed.2d 808 (1991); *see also* H.R.Rep. No. 94-1609, 94th Cong., 2d Sess. 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167 (magistrate is to "assist the district judge in a variety of pretrial and preliminary matters thereby facilitating the ultimate and final exercise of the adjudicatory function at the trial of the case"); S.Rep. No. 92-1065, 92nd Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351 (magistrates "render valuable assistance to the judges of the district courts, thereby freeing the time of those judges for the actual trial of cases"); H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255 (purpose of Act is "to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers"). The answer to the question now raised hinges therefore on whether the referral is a pretrial matter.

A. *Pretrial Matters*

Under the pretrial matters clause, a magistrate judge may be assigned to "hear and determine any pretrial matter." 18 U.S.C. § 636(b)(1)(A). The district court retains the supervisory power to review the magistrate's determination upon a showing that it "is clearly erroneous or contrary to law." *Id.*; *see also Gomez*, 490 U.S. at 868, 109 S.Ct. at 2244. The amendment to the pretrial matters clause aimed to "clarify the broad authority to refer 'any pretrial matter.' " H.R.Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169. Only eight categories of

dispositive pretrial motions, which might otherwise fall within the broad range of pretrial matters that could be referred, were excepted. *See* 18 U.S.C. § 636(b)(1)(A).

Referral of a Title III wiretap application is not one of the enumerated exceptions. An ancient maxim of statutory interpretation seems particularly apt in such a circumstance: "*Inclusio unius est exclusio alterius*" (The inclusion of one is the exclusion of another). Thus, it logically follows that since the eight exceptions to the pretrial matters clause did not include Title III wiretap referrals, it was not one of those categories of cases excepted from the broad range of cases that could properly be referred. *See United States v. Diaz*, 922 F.2d 998, 1002 (2d Cir.1990). Absent an affirmative reason to believe the 94th Congress had a different purpose, we should not judicially repeal the authorization to refer effectuated by Congress in 1968 and in 1976.

It is of more than slight significance that arrest warrants and search warrants were among those criminal pretrial matters enumerated in the Committee Report that set forth the types of pretrial matters included within this provision. *See Gomez*, 490 U.S. at 868, n. 16, 109 S.Ct. at 2244 n. 16; H.R.Rep. No. 1609, 94th Cong., 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167, 6169. The *ex parte* nature of such individual applications is wholly analogous to the authorization for a wiretap. The notion that a wiretap is somehow more intrusive on personal privacy than an arrest or search warrant, and therefore only to be authorized by an Article III judge, blinks reality.

Concededly, those subject to an arrest or search warrant have notice at the time the intrusion occurs, while the wiretap is secret and without notice. But the knowledge imparted comes about because of the nature of the intrusion, not because there is a view that it constitutes a greater or lesser invasion of an individual's right to privacy than does a wiretap. It might well be said that the execution of an arrest

warrant not only deprives the individual of his or her right to privacy, it also denies to the individual the fundamental right to liberty, making that privacy intrusion greater than that imposed by a wiretap.

Yet, distinctions in Fourth Amendment jurisprudence based on differing levels of intrusiveness are disfavored by the Supreme Court. *See Arizona v. Hicks*, 480 U.S. 321, 325, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987) (finding that "[a] search is a search," regardless of its level of intrusiveness). This is because parsing out invasions of privacy tramples on the bright line the Court has attempted to establish in Fourth Amendment law. Hence, privacy cannot serve as a reason to deny a reference to a magistrate judge.

Moreover, and perhaps most importantly, applications for arrest and search warrants regularly call on magistrate judges to make the same probable cause determination that is at the heart of all Title III application decisions. *See* 18 U.S.C. § 2518(3)(a)(b)-(c). Affording district judges the right to delegate this authority to magistrate judges does not therefore construe the pretrial matters clause so as "to include responsibilities of far greater importance than the specified duties assigned to magistrates." *Peretz*, --- U.S. at ---, 111 S.Ct. at 2667; *see also Gomez*, 490 U.S. at 864, 109 S.Ct. at 2241 ("Any additional duties performed pursuant to a general authorization in the statute reasonably should bear some relation to the specified duties."). As such, there is no principled reason to infer that a wiretap application should not fall within the scope of the pretrial matters clause, while an arrest and search warrant should.

Congress, as noted, has ruled that arrest and search warrants are pretrial matters within the meaning of the clause. *See Gomez*, 490 U.S. at 868, n. 16, 109 S.Ct. at 2244 n. 16; H.R.Rep. No. 1609, 94th Cong., 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167, 6169. The comparative analysis is not destroyed simply because these

matters are also embraced by § 636(a)(1), which authorizes magistrates to assume all the duties previously held by commissioners. It bears repeating that commissioners were roundly criticized for their handling of those matters, which in itself was a major impetus for the creation of magistrates in the first place.

B. *Additional Duties*

Neither the Magistrates Act nor the cases interpreting the Act are altogether clear on the scope of the pretrial matters clause or the delineation between the pretrial matters and the additional duties clauses. Notwithstanding this murkiness, if the assignment of a Title III application is not a pretrial matter, then it must fall within the catch-all "additional duties" clause.

The government suggests that because no other judge has ever referred an application to a magistrate judge, Judge Korman should be mandamused not to refer such because in so doing he acts beyond his power. This contention, here upheld by my respected colleagues, thwarts Congress' purpose when it included the additional duties clause in the 1976 amendments to the Magistrates Act. Congress sought to encourage experimentation so as to relieve district judges of time-consuming matters that do not require an Article III judge, and that distract such judges from the trying of cases. As the House Judiciary Committee explained:

> This subsection enables the district courts to continue innovative experimentations in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to

> magistrates which may not necessarily be included in the broad category of "pretrial matters".
>
> . . . . .
>
> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

H.R.Rep. No. 1609, 94th Cong., 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172.

Judge Korman describes the burden review of Title III applications places on already overworked district courts.

> Specifically, applications for Title III orders are accompanied by long and prolix affidavits. Review of these applications is often time consuming and the judicial officer's task does not end with his or her signature on the order. After the wire interception is in place, there are periodic reports that require the judicial officer to monitor its progress. Moreover, where relevant conversations are seized, the judicial officer will usually be faced with equally lengthy and prolix renewal applications.

In re U.S. Attorney, 784 F.Supp. 1019, 1027 (E.D.N.Y.1992). Refusing to allow referral of these applications to magistrate judges who are intended to be an extra set of eyes, ears and hands and who already regularly perform similar tasks--many of which require the same determination of whether or not probable cause exists--only undermines the common goal of ensuring thorough monitoring of Title III applications.

The Supreme Court has stamped its imprimatur on a broad interpretation of the additional duties clause consistent with Congress' plan.

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Peretz, --- U.S. at ---, 111 S.Ct. at 2667. The only limitations placed on this method of testing for improvements in judicial efficiency was expressed by the Court in *Peretz*. First, just as with a supplemental duty under the pretrial matters clause, the delegation of another duty pursuant to the "additional duties" clause cannot "include responsibilities of far greater importance than the specified duties assigned to magistrates." *Peretz*, --- U.S. at ---, 111 S.Ct. at 2667. For the reasons discussed earlier, this limitation is not implicated.

Second, the delegated duty cannot be "inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). This language cannot preclude a district court's referral of a Title III application to a magistrate simply because of the language of 18 U.S.C. § 2510(9). Some affirmative indication of congressional purpose to prohibit use of a magistrate is required or some conflict with the Constitution must be shown. Any other reading of the statute would render the lead-in language of § 636(b), "notwithstanding any provision of law," superfluous, contravening the norms of statutory construction. *See Freytag v. Commissioner*, --- U.S. ---, ---, 111 S.Ct. 2631, 2638, 115 L.Ed.2d 764 (1991); *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990).

For example, as the district court in the instant case points out, a jury verdict must under Fed.R.Crim.P. 31 be returned to "a judge." But the legislative history of § 636(b) teaches that the additional duties clause permits magistrates to take a jury verdict "where the trial judge is unavailable." *See In re U.S. Attorney*, 784 F.Supp. at 1026, n. 10. Hence, the word "judge" may not be read consistent with Congress' scheme to exclude "magistrate judge," absent some affirmative indication from the legislature.

Further, the interplay of the Supreme Court's opinions in *Peretz* (allowing district courts to assign jury *voir dire* in a criminal case to magistrates when the parties consent) and *Gomez* (not allowing the foregoing where the parties did not consent) is particularly instructive respecting the scope of the additional duties clause. In *Peretz*, the Court said its holding in *Gomez* was predicated on concern that a magistrate's conducting of jury voir dire without a defendant's consent involved the potential deprivation of a significant constitutional right or privilege. *See Peretz*, --- U.S. at ---, 111 S.Ct. at 2666.

In the instant case, there are no constitutional concerns. The Fourth Amendment requires that the probable cause determination be made by a "neutral and detached magistrate." *See Coolidge v. New Hampshire*, 403 U.S. 443, 453, 91 S.Ct. 2022, 2031, 29 L.Ed.2d 564 (1971). Obviously, the Fourth Amendment is not violated by the delegation of a wiretap application to a magistrate judge. Because the Court found no constitutional impairment in *Peretz*, it "therefore attach[ed] far less importance ... to the fact that Congress did not focus on jury selection as a possible additional duty for magistrates." --- U.S. at ---, 111 S.Ct. at 2667. As in *Peretz*, the absence here of any constitutional difficulty obviates the need to find unambiguous evidence of Congress' design to include Title III applications among the additional duties a district court can refer to a magistrate. *See id.*

III

The government urges that analysis of Congress' intent in this case be guided by the Electronic Communications Privacy Act of 1986, Pub.L. No. 99- 508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 3121-3127 (1988)). This argument fails for several reasons.

To begin with, courts have an unflagging duty to read the laws of the United States in accord with what judges perceive is Congress' scheme, not as judges might prefer. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987); *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23 (1981). Thus, we must be guided by what the 94th Congress had in mind when it enacted the 1976 amendments to the Magistrates Act and, to a lesser extent, the plan the 90th Congress had when it enacted Title III and, later in that same session, the original Magistrates Act. To say that the 94th Congress' intent was that Title III applications should not be referred to magistrate judges pursuant to the Magistrates Act because the 99th Congress did not amend 18 U.S.C. §§ 2518(1) and 2510(9) is a weak reed to rely on when construing such comprehensive statutes. That is to say, "it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) (quoting *Jefferson County Pharmaceutical Ass'n v. Abbot Labs.*, 460 U.S. 150, 165 n. 27, 103 S.Ct. 1011, 1021 n. 27, 74 L.Ed.2d 882 (1983)).

Further, even assuming *arguendo* that we should in some sense be guided by what Congress did in 1986, its actions can reasonably be read so as not to conflict with the conclusion that Title III applications can be referred to a magistrate. The 1976 amendments and its inclusion of the "notwithstanding any law to the contrary" language was reflective in effect.

Congress modified all those provisions that referred to "judge" or "court," as it made perfectly plain. Included within that sweep was § 2510(9), as it defined judge of competent jurisdiction in all the *then-existing* provisions of Title III.

Next, when Congress later included the pen register provisions in 1981, it could not simply have said applications must be submitted to a "judge of competent jurisdiction" and referenced § 2510(9), as the government argues. Doing so would have rendered the pen register provisions ambiguous. The reflective 1976 amendments could not logically be read to modify later-enacted provisions of Title III. As a consequence, a new term had to be used with a different definitional section, which included magistrate. Insofar as § 2510(9) pertained to Title III wiretap applications, there was therefore no need to change or amend it; Congress had already changed it in 1976.

In disputing this proposition the government's reliance on *Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974), is misplaced. Because the Attorney General's power to delegate authority under 28 U.S.C. § 510 predated Title III, logically § 510 could not modify the unambiguous language of Title III so as to allow the Attorney General to delegate the power to authorize wiretap applications. In analyzing this issue the Supreme Court would focus on Title III because as the later-enacted statute, it was controlling. In contrast, the expanding provisions in both the 1976 amendments and the original Magistrates Act succeed Title III, and as such they control. Hence, the provisions of the 1981 Electronic Communications Act really shed no new light on the controlling statutes. It violates a cardinal rule of construction to view the pen register act of 1986 as repealing the Magistrates Act by implication.

Finally, the government declares that the contrast between the stringent controls placed on wiretap orders versus the

much less onerous requirements for pen register authorizations indicates that Congress thought wiretap orders required the approval of a district judge. It is equally plausible to believe Congress recognized that the use of a pen register--compared to a wiretap--did not implicate the Fourth Amendment. *See Smith v. Maryland*, 442 U.S. 735, 745-46, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979).

CONCLUSION

For the reasons stated, I vote to deny the petition for a writ of mandamus.

APPENDIX B

In re Applications of UNITED STATES ATTORNEY FOR ORDERS PURSUANT TO TITLE III OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968

Misc. No. 92-43.

United States District Court,

E.D. New York.

Feb. 14, 1992.

MEMORANDUM AND ORDER

KORMAN, District Judge.

Pursuant to an administrative order of Chief Judge Platt, I am serving in the Miscellaneous Part from February 10, 1992 to February 23, 1992. One of the duties of the judge assigned to the Miscellaneous Part is the review of applications for electronic eavesdropping orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-21 (1988). Because it is my intention to refer such applications to a United States magistrate judge, I address here the issue whether the referral of a Title III application to a United States magistrate judge is authorized by the Federal Magistrates Act.

DISCUSSION

The Federal Magistrates Act of 1968, Pub.L. No. 90-578, 82 Stat. 1107, codified as amended at 18 U.S.C. §§ 3401-3402; 28 U.S.C. §§ 631-39 (1988 & Supp. I 1989), abolished the office of United States commissioner and replaced it with a judicial officer serving directly below the level of the district court. Congress imposed significant requirements to ensure the competency and impartiality of

these judicial officers and it gave them significantly--indeed, dramatically--more responsibility than it had previously conferred on United States commissioners.

Congress conferred on magistrates not only all powers formerly exercised by commissioners, it also conferred on magistrates the power to try minor offenses when all parties consent, and to perform such additional duties assigned by the district court as are "not inconsistent with the Constitution and laws of the United States." Federal Magistrates Act of 1968 § 636(b), Pub.L. No. 90-578, 82 Stat. 1108, 1113 (1968). The "additional duties" could include, but were not restricted to

> (1) service as a special master in an appropriate civil action, pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts;
>
> (2) assistance to a district judge in the conduct of pretrial or discovery proceedings in civil or criminal actions; and
>
> (3) preliminary review of applications for post-trial relief made by individuals convicted of criminal offenses, and submission of a report and recommendations to facilitate the decision of the district judge having jurisdiction over the case as to whether there should be a hearing.

Id.

The experience under former section 636(b) demonstrated that magistrates were fulfilling their intended function of assisting "the district judge to the end that the district court judge could have more time to preside at the trial of cases." H.R.Rep. No. 1609, 94th Cong., 2nd Sess. 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6166. Congress was disturbed, however, by a series of cases that construed former section 636 in a manner that limited the "additional duties"

that could be conferred on magistrates. *See e.g. Wingo v. Wedding*, 418 U.S. 461, 94 S.Ct. 2842, 41 L.Ed.2d 879 (1974); *T.P.O. v. McMillen*, 460 F.2d 348 (7th Cir. 1972); *Ingram v. Richardson*, 471 F.2d 1268 (6th Cir. 1972). Accordingly, former section 636(b) was rewritten in 1976 to restate and clarify "the Congressional intention that the magistrate should be a judicial officer who, not only in his own right but also under general supervision of the court, shall serve as an officer of the court in disposing of minor and petty criminal offenses, in the preliminary or pretrial processing of both criminal and civil cases, and in hearing dispositive motions and evidentiary hearings when assigned to the magistrate by a judge of the court." H.R.Rep. No. 1609, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 6162, 6165.

There are two clauses of the revised section 636(b) that are particularly relevant to the issue whether an application for an eavesdropping order may be referred to a United States magistrate judge: The "pretrial matters" clause and the "additional duties" clause. An analysis of the language and legislative history of these two clauses, which were enacted after the Omnibus Crime Control and Safe Streets Act of 1968, provides compelling support for referral of these applications to a United States magistrate judge.

A. *The "Pretrial Matters" Clause*

The "pretrial matters" clause of the Federal Magistrates Act provides that, "[n]otwithstanding any provision of law to the contrary ... any pretrial matter pending before the court," except for certain dispositive motions, may be referred to a United States magistrate judge. 28 U.S.C. § 636(b)(1)(A). Because this clause is applicable to *ex parte* proceedings that take place prior to the commencement of a criminal case, *United States v. Diaz*, 922 F.2d 998 (2d Cir.1990), the principal objection to the referral of an application for a Title III order to a United States magistrate judge derives from the

fact that these judicial officers are not among the judges of competent jurisdiction in whom Congress explicitly vested the authority to issue such orders--namely, judges of the United States district courts and the courts of appeals.[1] 18 U.S.C. §§ 2510(9)(a) and 2516(1).

Of some relevance to this objection is *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). There at issue was 18 U.S.C. § 2516(1), as originally enacted, which empowered the "Attorney General or any Assistant Attorney General specially designated by the Attorney General" to "authorize an application to a federal judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies. Omnibus Crime Control and Safe Streets Act of 1968 § 2516(1), Pub.L. No. 90-351, 82 Stat. 197, 216 (1968).[2] Relying on 28 U.S.C. § 510, which authorized the delegation of "any function of the Attorney General" to "any other officer" or "employee" of the Department of Justice, the Solicitor General argued that

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[1] Section 2516(1) of Title III provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a *Federal judge of competent jurisdiction* for, and such judge may grant ... an order authorizing or approving the interception of wire or oral communications ...

18 U.S.C. § 2516(1). Section 2510(9)(a) defines "federal judge of competent jurisdiction" as "a judge of the United States district court or a United States court of appeals."

[2] In 1986, Congress amended § 2516(1) to expand the list of officials to whom the Attorney General could delegate the authority to make applications for eavesdropping orders. *See* note 1, *supra*.

the power to authorize a Title III application could be delegated by the Attorney General to a subordinate other than an Assistant Attorney General. In rejecting this argument, the Supreme Court wrote:

> Despite § 510, Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated. Under the Civil Rights Act of 1968, for instance, certain prosecutions are authorized only on the certification of the Attorney General or the Deputy Attorney General, "which function of certification may not be delegated." 18 U.S.C. § 245(a)(1). Equally precise language forbidding delegation was not employed in the legislation before us; but we think § 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate. This interpretation of the statute is also strongly supported by its purpose and legislative history.

416 U.S. at 514, 94 S.Ct. at 1826.

The conclusion the Supreme Court reached in *Giordano* could arguably apply to the question whether the authority to issue eavesdropping orders, which Title III vests in judges of the United States District Court and the United States Court of Appeals, may be delegated to United States magistrate judges. Such an extension of the holding in *Giordano*, however, could not be reconciled with two critical aspects of the Federal Magistrates Act. Unlike 28 U.S.C. § 510, the Federal Magistrates Act was adopted after the enactment of Title III and it contains a clause that permits the delegation of specified authority vested in district court judges *notwithstanding* any existing law to the contrary. More significantly, a careful analysis of the legislative history demonstrates that the failure of Congress to include United States magistrate judges among the judges authorized to issue Title III orders does not provide a sufficient basis for inferring that Congress

intended to preclude the delegation of that responsibility pursuant to the subsequently enacted Federal Magistrates Act.

The Organized Crime Control and Safe Streets Act of 1968 and the Federal Magistrates Act of 1968 were enacted by the 90th Congress. A common thread running through both is the finding of Congress that defects in the commissioner system had undermined the competence, integrity and professionalism of the United States commissioners. Commissioners were paid under a fee system according to the number and nature of the matters they handled; many served only on a part-time basis; one third of commissioners were nonlawyers; most commissioners were required to use their own resources to meet the expenses of their office; commissioners received little guidance in performing their duties; and commissioners were grossly underpaid and were subject to removal without cause, making it difficult to attract qualified applicants. H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4255-56; McCabe, The Federal Magistrates Act of 1979, 16 Harv.J.Legis. 343, 347 (1979).

The sorry state of the commissioner system was summed up by Senator Tydings during the course of the debates leading to the passage of the Federal Magistrates Act:

> One's first impression, Mr. President, is that it is certainly less than a happy situation that a person who has not been admitted to the bar--and who therefore, has no trial experience, and probably little if any familiarity with the Federal Rules of Criminal Procedure or with the rules of evidence--should be permitted to discharge responsibilities that call for the exercise of trained legal judgment. The decisions that commissioners must routinely make often involve some of the most difficult points of constitutional law, which the best lawyers and judges are hard pressed to apply correctly.

Senator Tydings continued that, when reviewing an application for a search or arrest warrant, "a U.S. commissioner may be the only judicial officer in a position to insure that individual rights are not disregarded by overzealous prosecutors. Yet ... it appears in many instances the action of the Commissioner may be little more than a rubber stamp of the application of the complaining officer."[3] Subsequently, testimony taken by the Senate Judiciary Subcommittee on Improvements in Judicial Machinery established that "[i]n many districts search warrants and arrest warrants are handled on a mass production basis with no independent judicial determination being made as to whether probable cause exists for the issuance of a warrant." Memorandum Prepared by the Staff of the Subcomm. on Improvements in Judicial Machinery, April 28, 1966, *reprinted in* 1966-67 Senate Hearings at 9.

The Omnibus Crime Control and Safe Streets Act addressed this problem by specifically providing that "a judge of the United States district court or a United States court of appeals" could entertain applications for Title III orders made by federal law enforcement officers. In explaining this clause, the Senate Judiciary Committee observed that, although "existing practice permitted United States Commissioners and city mayors to issue search warrants," that practice was "too permissive for the interception of wire or oral communications." S.Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2179. The Federal Magistrates Act, which was enacted shortly thereafter, addressed the problem more directly by abolishing

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[3] Remarks of Hon. Joseph D. Tydings, on the Floor of the Senate, October 15, 1965, *reprinted in* Federal Magistrates Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. & 90th Cong., 1st Sess. 6, 7 (1966 & 1967) [hereinafter "1966-67 Senate Hearings"].

the office of United States commissioner and creating the office of United States magistrate. Echoing the sentiments voiced in the legislative history of Title III, the House Judiciary Committee explained that one of its primary concerns was that "[c]ommissioners in many districts grant[ed] search and arrest warrant applications perfunctorily, thereby depriving both the accused and the legal system of an independent determination of the question of probable cause." H.R.Rep. No. 1629, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 4252, 4256.

To rectify this problem, Congress created the office of United States magistrate, thereby increasing "the overall efficiency of the federal judiciary while at the same time providing a higher standard of justice at the point where many individuals first come into contact with the courts." H.R.Rep. No. 1629, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 4252, 4257.[4] These judicial officers are appointed by a majority of the judges of the district court for a term of eight years, and may be removed only for cause. 28 U.S.C. §§ 631(e) and (i). Congress not only set certain minimum qualifications, it also expressly provided that a United States magistrate be selected pursuant to standards and procedures promulgated by the Judicial Conference of the United States. Such standards and procedures must "contain provision for public notice of all vacancies in magistrate positions and for the establishment by the district courts of merit selection panels, composed of residents of individual judicial districts, to assist the courts in identifying and recommending persons who are best qualified to fill such positions." 28 U.S.C. § 631(b)(5). The standards promulgated by the Judicial Conference require that the selection of

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[4] The possibility of transferring the commissioners' responsibilities to district court judges was considered and rejected by the Subcommittee on Improvements in Judicial Machinery. 1966-67 Senate Hearings at 238-39 (Remarks of Senator Tydings).

United States magistrate judges be made from a list of nominees (up to five for each vacancy) who have been found by the merit selection panel to "possess the same types of personal and professional qualities expected of district judges."[5]

The Federal Magistrate Act also abandons the fee system and provides that United States magistrates may not engage in the practice of law or any other business "inconsistent with the expeditious, proper and impartial performance of their duties as judicial officers." 28 U.S.C. § 632(a).[6] United States magistrates today receive a salary close to that of district court judges, which cannot be reduced during their term in office, 28 U.S.C. § 634(a) and (b), and are provided with law clerks to assist them in their work. Administrative Office of the United States Courts, *Legal Manual: United States Magistrates* § 1.10. Indeed, in 1990, Congress changed the title of these judicial officers to "United States magistrate judge" in order to "reflect more accurately the responsibilities and duties of the office." Judicial Improvements Act of 1990 § 321, Pub.L. No. 101-650, 104 Stat. 5089, 5117 (1990); H.R.Rep. No. 734, 101st Cong., 2d

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[5] Administrative Office of the United States Courts, The Selection and Appointment of United States Magistrates 10, 12-13 (1987). The procedure for reappointment requires the establishment of a similar panel, which reviews the incumbent's performance, considers comments from members of the bar and public, and submits a recommendation to the district court. *Id.* at 14-16.

[6] The Act discourages the use of part-time magistrates and permits their appointment only where "employment of a full-time magistrate would not be feasible or desirable." 28 U.S.C. § 63(a)(3). Part-time magistrates, who are appointed to a four-year term, are prohibited from serving "as counsel in any criminal action in any court of the United States." 28 U.S.C. § 632(b).

Sess. 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6877.

The lesson to be drawn from this legislative history is that the referral of an eavesdropping application to a United States magistrate judge does not implicate any of the concerns underlying Title III's facially restrictive definition of judges who are competent to issue eavesdropping orders. The office of United States commissioner, at which that definition was directed, no longer exists; and the concerns about the competence and professionalism of those serving as United States commissioners do not apply to those serving as United States magistrate judges. Indeed, United States magistrate judges enjoy tenure, compensation and independence comparable to that of many state judges who today issue orders pursuant to Title III.[7]

Moreover, it is not material that, after it enacted the Federal Magistrates Act, Congress failed to confer on United States magistrate judges the authority to entertain a Title III application. While Congress clearly contemplated that United States magistrate judges would perform other functions that were vested in United States district court judges, the assumption was that these duties could be referred to a United States magistrate judge if they came within the broad grant of

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[7] In New York State, Supreme Court Justices and County Court Judges are authorized by Title III to issue eavesdropping orders. 18 U.S.C. § 2510(9); N.Y.Crim.Proc.Law § 700.05(4) (McKinney 1984). Supreme Court Justices are elected for 14 year terms, N.Y.Const. Art. 6, § 6(c) (McKinney 1987), and County Court Judges are elected for ten year terms, N.Y. County Law § 400(1) (McKinney 1991). Their reelection depends on currying favor of party leaders or the vagaries of the electoral process, and their compensation is substantially less than that of United States magistrate judges.

delegable authority specified in 28 U.S.C. § 636(b).[8] Indeed, Congress rewrote Section 636(b) in 1976 to overcome a crabbed judicial construction of the Federal Magistrates Act and to make plain its intent to override any inconsistency that may derive from the fact that a delegable duty within the scope of the clause is vested in a "judge" or a "court." As the Senate Judiciary Committee Report explained:

> The initial sentence of the revised section uses the phrase "notwithstanding any provision of law to the contrary--". This language is intended to overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to "the judge" or "the court." It is not feasible for the Congress to change each of those terms to read "the judge or a magistrate." It is, therefore, intended that the permissible assignment of additional duties to a magistrate shall be governed by the revised section 636(b), "notwithstanding any provision of law" referring to "judge" or "court."

S.Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R.Rep. No. 1609, 94th Cong.2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6169.

Particularly apposite here is the recent holding of the Court of Appeals for the Second Circuit that the empaneling of a grand jury may be referred to a United States magistrate judge even though the Jury Selection Service Act confers such authority only on "[t]he Chief Judge of the District Court, or such other district court judge as the [the district's jury

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[8] Congress did amend Fed.R.Crim.P. 41 to substitute United States magistrate for United States commissioner as one of the judicial officers authorized to issue search warrants. Federal Magistrates Act of 1968 § 301, Pub.L. No. 90-578, 82 Stat. 1108, 1115 (1968). This contemporaneous amendment of Rule 41 was necessitated by the fact that the Federal Magistrates Act abolished the office of United States commissioner.

selection] plan may provide...." 28 U.S.C. 1865(a) (1988). *United States v. Diaz*, 922 F.2d at 1002. In an opinion by Judge Kearse, the Court of Appeals held that "the apparent limitation in the Jury Act is overridden by [the "pretrial matters" clause,] 28 U.S.C. § 636(b)(1)(A)." *Id.* at 1002.

The "pretrial matters" clause, it will be recalled, provides that "[n]otwithstanding any provision of law to the contrary ... a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except for eight specified dispositive motions. 28 U.S.C. § 636(b)(1)(A). Because "[t]he selection and empaneling of a grand jury are not among the tasks expressly excluded from this authorization, and they plainly occur prior to any part of the trial," the Court of Appeals concluded that "[o]n its face ... § 636(b)(1)(A) appears to authorize delegation of the pretrial functions of grand jury selection and empaneling to a magistrate." *Diaz*, 922 F.2d at 1002.

The Court of Appeals then examined the legislative history of section 636(b)(1)(A), which made no reference to the delegation of such authority to a magistrate. Based on other pretrial and preliminary matters that Congress clearly contemplated could be referred to a United States magistrate judge, the Court of Appeals found that it was unlikely that Congress meant to withhold from that judicial officer the authority to empanel grand juries. *Diaz*, 922 F.2d at 1004. The same legislative history demonstrates that Congress contemplated that the issuance of search warrants, among other pre-indictment matters, would fall within the ambit of the "pretrial matters clause." *See* H.R.Rep. No. 1609, 94th Cong. 2d Sess. 7, 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6167-69.

While electronic eavesdropping is potentially more invasive of privacy than ordinary searches and seizures, and while Congress was unwilling to entrust to United States commissioners the responsibility of determining whether either of

these intrusions should take place, it is unlikely that Congress intended that the same judicial officer it found competent to issue a warrant to arrest a person, to ransack his house, and seize his most private papers, be denied the authority to entertain a motion for electronic eavesdropping upon the referral of a district court judge. Under these circumstances, there is no more reason here than in *Diaz* to deny full effect to the overriding language of the "pretrial matters" clause.

B. *The "Additional Duties" Clause*

One of the 1976 amendments to section 636(b) created a separate subsection providing that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States." 28 U.S.C. § 636(b)(3). The House Judiciary Committee emphasized the expansive nature of this "catchall" clause:

> A similar provision is contained in the existing legislation. This subsection enables the district courts to continue innovative experimentation in the use of this judicial officer. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
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> . . . . .
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> If district judges are willing to experiment with the assignment to magistrates of other functions in aid of the business of the courts, there will be increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties, and a consequent benefit to both efficiency and the quality of justice in the Federal courts.

H.R.Rep. No. 1609, 94th Cong. 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; S.Rep. No. 625, 94th Cong., 2d Sess. 10-11 (1976). This expansive expression of congressional intent is echoed in a number of subsequent

Supreme Court decisions. Most recent among these is *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 2671, 115 L.Ed.2d 808 (1991), in which it was held that "permitting a magistrate to conduct the *voir dire* in a felony trial when the defendant raises no objection is entirely faithful to the congressional purpose in enacting and amending the Federal Magistrates Act." The Court added:

> The generality of the category of "additional duties" indicates that Congress intended to give federal judges significant leeway to experiment with possible improvements in the efficiency of the judicial process that had not already been tried or even foreseen. If Congress had intended strictly to limit these additional duties to functions considered in the committee hearings or debates, presumably it would have included in the statute a bill of particulars rather than a broad residuary clause.

Id., 111 S.Ct. at 2667.[9]

There are two interrelated limitations on the "additional duties" clause that distinguish it from the "pretrial matters" clause. The first, which appears in the text of the clause, is that the delegation of a duty not be "inconsistent" with the laws of the United States. The second, which derives from the gloss the Supreme Court has placed on the clause, is that

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[9] Among the duties that have been referred to magistrates under the "additional duties" clause are the review of social security cases for report and recommendation to the district court judge, *Mathews v. Weber*, 423 U.S. 261, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976), the taking of a guilty plea, *United States v. Khan*, 774 F.Supp. 748 (E.D.N.Y.1991), the determination of a motion to quash a grand jury subpoena, *In re Grand Jury Proceedings Dzikowich*, 620 F.Supp. 521 (D.C.Wis.1985), and the issuance of an order granting immunity to a witness and compelling the witness to testify in the grand jury. *In re Grand Jury Appearance of Cummings*, 615 F.Supp. 68 (D.C.Wis.1985).

the delegated duty not be of "far greater importance" than specified duties that may be assigned to magistrates. *Peretz*, 111 S.Ct. at 2667.

The delegation of a Title III application to a United States magistrate judge is not inconsistent with Title III merely because the latter provides that judges of the United States district courts may issue eavesdropping orders. Any case to which the "additional duties" clause may be applicable will also involve the delegation of some duty that is vested initially in a judge. Accordingly, it would frustrate the intent of Congress if a nonadjudicatory responsibility could not be delegated to a United States magistrate judge *merely* because that responsibility is specifically conferred on a district court judge. Unless the language or legislative history clearly indicates that Congress did not intend to authorize the delegation of a particular duty, this circumstance alone should not preclude delegation under the "additional duties" clause.[10] *See United States v. Khan*, 774 F.Supp. 748, 753-54 (E.D.N.Y.1991); *In re Grand Jury Appearance of Cummings*, 615 F.Supp. at 71.

The preceding discussion has shown that the facially restrictive definition of judges competent to issue Title III orders was not written for the purpose of denying United

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[10] This conclusion is implicit in the legislative history of section 636(b)(3). Specifically, the House Judiciary Committee suggested that the additional duties clause would permit magistrates "to accept returns of jury verdicts where the trial judge is unavailable," even though Fed.R.Crim.P. 31 provides that a jury verdict shall be returned to "the judge" in open court, and Fed.R.Crim.P. 25 provides that, if a judge becomes disabled during the course of trial, "any other judge regularly sitting in or assigned to the court ... may proceed with and finish the trial." *See* H.R.Rep. No. 1609 (1976), 94th Cong., 2d Sess. 12, *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; *United States v. Arnoldt*, 947 F.2d 1120, 1123 (4th Cir.1991).

States magistrate judges the authority to issue such orders. Moreover, it is equally clear that the consideration of such applications is not of far greater importance than the duty these judicial officers perform in overseeing the procedural mechanism that "is central to the Fourth Amendment,"--namely, the antecedent determination whether a search or arrest warrant should issue. *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 272, 80 S.Ct. 1463, 1468, 4 L.Ed.2d 1708 (1960) (separate opinion of Brennan, J.).

The findings that must be made by a United States magistrate judge when issuing a search warrant differ only marginally from those which must be made by a judicial officer who issues an electronic eavesdropping order.[11] Before issuing an eavesdropping order, a judicial officer must determine that there is probable cause to believe that incriminating conversations relating to certain specified offenses will be intercepted and that comparable evidence cannot be obtained through the use of other investigative procedures. 18 U.S.C. § 2518(3)(a), (b) and (c). Similar findings of fact must be made by a United States magistrate judge before authorizing the kinds of significant invasions of privacy for which the Fourth Amendment requires a search warrant. A United States magistrate judge must not only determine that there is probable cause to believe that a crime has been committed and that evidence of criminal activity will be found on the premises to be searched, the magistrate also "must judge the reasonableness of every warrant in light of the circumstances

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[11] *Cf. In re Grand Jury Proceedings Dzikowich*, 620 F.Supp. at 524 (holding that a magistrate has authority to determine a claim of illegal electronic surveillance brought pursuant to 18 U.S.C. § 3504, and noting that such determination is "similar to the reviewing of documentation for search warrants in which magistrates engage on a regular basis."); 18 U.S.C. §§ 3122(a) and 3127(2)(A) (1988) (authorizing a magistrate judge to order the installation of pen registers and trap and trace devices).

of the particular case, carefully considering the description of evidence sought, the situation of the premises, and the position and interests of the owner or occupant." *Zurcher v. Stanford Daily*, 436 U.S. 547, 570, 98 S.Ct. 1970, 1984, 56 L.Ed.2d 525 (1978) (Powell J., concurring).[12] Fed.R.Crim.P. 41 expressly singles out one such circumstance and requires a United States magistrate judge to consider whether a requisite showing of cause has been made to permit a search to be conducted during nighttime hours. Moreover, where a search implicates First Amendment values, special obligations devolve on the magistrate to ensure that the requirements of the Fourth Amendment are applied with "scrupulous exactitude," *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965); *Zurcher*, 436 U.S. at 564, 98 S.Ct. at 1980, and to consider the First Amendment values at stake, "as well as the societal interest in enforcing the criminal laws." 436 U.S. at 571, n.3, 98 S.Ct. at 1984, n.3 (Powell, J., concurring).

While the ultimate determination whether to issue a Title III order or to permit its renewal requires judgments comparable to those made in issuing search warrants, the burden of considering these applications makes it a particularly appropriate duty to assign to United States magistrate judges. Specifically, applications for Title III orders are accompanied by long and prolix affidavits. Review of these applications is often time consuming and the judicial officer's task does not end with his or her signature on the order. After the wire interception is in place, there are periodic reports that require the judicial officer to monitor its progress. Moreover, where relevant conversations are seized, the judicial officer will usually be faced with equally lengthy and prolix renewal

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[12] Justice Powell cast the deciding vote in *Zurcher*. The views expressed in his concurring opinion, although somewhat more explicit, are consistent with the majority opinion in which Justice Powell joined.

applications. The referral of these applications by district court judges will plainly further the congressional objective of making increased "time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties," and increase the "efficiency and the quality of justice in the Federal courts." H.R.Rep. No. 1609, 94th Cong. 2d Sess. 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6162, 6172; S.Rep. No. 625, 94th Cong., 2d Sess. 10-11 (1976).[13]

The only remaining question presented is whether Article III of the United States Constitution precludes authorization of a wire interception by a magistrate. Recent Supreme Court decisions have upheld the delegation of certain adjudicatory responsibilities to magistrates. *United States v. Raddatz*, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980) (motion to suppress evidence); *Peretz v. United States*, --- U.S. ---, 111 S.Ct. 2661, 115 L.Ed.2d 808 (1991) (jury selection). These cases rested on the availability of *de novo* review by the district court judge and, in *Peretz*, the parties' consent. While *de novo* review by a United States district court judge is available here,[14] neither such review nor the

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[13] In 1990, United States district court judges authorized 324 wire interceptions and granted 333 extensions. These figures have been increasing consistently, primarily as a result of an increase in drug investigations. Administrative Office of the United States Courts, Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 1, 9 (1991).

[14] The United States Attorney may obtain review of a denial of a Title III order by appealing to the district court judge who referred the application to the United States magistrate judge. The exhaustion of this process would not preclude an application to another district court judge if the initial application was ultimately denied. Of course, the *ex parte* nature of the proceeding precludes pre-authorization review at the behest of the subject of the intercep-

consent of the parties is necessary, because the authorization of a wiretap falls within the category of nonadjudicatory functions that need not be performed by an Article III judge. *See Mistretta v. United States*, 488 U.S. 361, 389-90 n. 16, 109 S.Ct. 647, 663-64 n. 16, 102 L.Ed.2d 714 (1989) (noting that the issuance of search warrants and the review of wiretap applications are among the nonadjudicatory functions performed by Article III judges).

An eavesdropping order is sought at an investigatory stage, in a nonadversarial context. In reviewing a wiretap application, a magistrate is not resolving a dispute between two parties, but rather is interposing his neutral and detached judgment so that prosecutors and law enforcement officials are not the sole judges of when to use constitutionally sensitive law enforcement techniques. *See United States v. United States District Court for Eastern Dist.*, 407 U.S. 297, 316-17, 92 S.Ct. 2125, 2136-37, 32 L.Ed.2d 752 (1972). While the authorizing officer cannot be subject to the control of the Executive Branch, the Fourth Amendment does not require that such officer be endowed with all of the attributes of an Article III judge:

> The substance of the Constitution's warrant requirement does not turn on the labeling of the issuing party. The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached and he

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tion. An aggrieved party, however, may obtain review of the validity of the order by a district court judge in a subsequent judicial proceeding, 28 U.S.C. § 2515, although not all aspects of such review can accurately be described as *de novo*. *See Illinois v. Gates*, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).

must be capable of determining whether probable cause exists for the requested arrest or search.

Shadwick v. Tampa, 407 U.S. 345, 350, 92 S.Ct. 2119, 2123, 32 L.Ed.2d 783 (1972). A United States magistrate judge plainly meets these "two tests." Indeed, the fact that a sitting United States Magistrate judge is subject to removal for cause and reappointment by the same United States district court judges who review eavesdropping orders (if they are later challenged at suppression hearings) operates to ensure that he will fulfill properly the special responsibilities with which he has been entrusted. *Cf. United States v. Karathanos*, 531 F.2d 26, 34 (2d Cir.), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3221, 49 L.Ed.2d 1217 (1976).

CONCLUSION

Accordingly, for the foregoing reasons, the United States Attorney's applications for wire interception orders pursuant to Title III are referred to the United States magistrate judge during the period from today until February 23, 1992 and from October 5, 1992 until October 18, 1992 when I will next serve in the Miscellaneous Part. I am prepared to entertain an application to stay this order to permit the United States Attorney to take such steps as he may deem appropriate if he disagrees with my conclusions. *See In re United States*, 903 F.2d 88 (2d Cir. 1990).

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of February on[e] thousand nine hundred and ninety-four.

IN RE: USA

DOCKET NUMBER: 93-3074

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellant USA.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:
/s/
Carolyn Clark Campbell
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23rd day of November, one thousand nine hundred and ninety-three.

In Re: UNITED STATES OF AMERICA,

Petitioner

Docket No. 93-3074

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE AND ELECTRONIC COMMUNICATIONS, ETC...

Before: Hon. Wilfred Feinberg, Hon. Richard J. Cardamone and Hon. Frank X. Altimari, CJJ

A Petition for a Writ of Mandamus having being filed by the United States Government and oral argument having been heard,

Upon consideration thereof, it is

ORDERED that the Writ of Mandamus be and it hereby is GRANTED in accordance with the opinion of this Court.

Further ordered that respondent Hon. Edward R. Korman, USDJ shall not delegate review of Title III applications to federal magistrate judges and to review personally an application now pending.

FOR THE COURT,
ELAINE B. GOLDSMITH, Clerk
By:

/s/
Edward J. Guardaro
Staff Attorney

APPENDIX E

A. Title III of the Omnibus Crime Control and Safe Streets Act of 1968:

18 U.S.C. § 2510. Definitions

* * *

(9) "Judge of competent jurisdiction" means –

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications; * * *

18 U.S.C. § 2516. Authorization for interception of wire, oral or electronic communications

(1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any actingAssistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federaljudge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications * * *.

B. Electronic Communications Privacy Act of 1986:

18 U.S.C. § 3127. Definitions for chapter

* * *

(2) the term "court of competent jurisdiction" means –

(A) a district court of the United States (including a magistrate of such a court) or a United States Court of Appeals; or

(B) a court of general criminal jurisdiction of a State authorized by the law of that State to enter orders authorizing the use of a pen register or a trap and trace device; * * *

C. Federal Magistrates Act:

28 U.S.C. § 636. Jurisdiction, powers, and temporary assignment

* * *

(b)(1) Notwithstanding any provision of law to the contrary –

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A)

where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(b)(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(2)

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No. 93-1855

In the Supreme Court of the United States

OCTOBER TERM, 1994

EDWARD R. KORMAN, JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal district judge may delegate to a magistrate judge the duty of hearing and ruling on a wiretap application.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 10 F.3d 931. The opinion of the district court (Pet. App. 29a-48a) is reported at 784 F. Supp. 1019.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1994. A petition for rehearing was denied on February 15, 1994. Pet. App. 49a. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June, 1993, petitioner, a district judge, was acting as Miscellaneous Judge for the United States District Court for the Eastern District of New York. One of the duties of the judge assigned to the Miscellaneous Part is to review applications for electronic eavesdropping orders pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2521 (1988 & Supp. 1992). Petitioner received such an application in connection with an investigation directed by the United States Customs Service and the United States Attorney's Office for the Eastern District of New York. By order dated June 30, 1993, petitioner referred the Title III wiretap application to a magistrate judge for decision. Pet. App. 1a-2a. In support of the referral, petitioner relied on the reasoning of his earlier order dated February 14, 1992, holding that the Federal Magistrates Act (Magistrates Act) authorized the referral of Title III applications to United States magistrate judges, and announcing his intention to refer all such applications to magistrate judges. *In re Application of the United States Attorney for Orders Pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968,* 784 F. Supp. 1019 (E.D.N.Y. 1992) (reproduced at Pet. App. 29a-48a), mandamus denied, No. 92-3080 (2d Cir. Mar. 23, 1993).[1] Petitioner held that the referral was valid under either of two provisions of the Federal Magistrates Act, the "pretrial matters" clause, 28

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[1] Pursuant to a request by the United States, petitioner had approved that earlier application and temporarily stayed his February 14, 1992, order of referral. Gov't C.A. Br. 4. The court of appeals summarily denied the mandamus petition of the United States, which sought to prevent petitioner from implementing that referral order, on the ground that no referral of a Title III application was before the court. Gov't C.A. App. 86-87.

U.S.C. 636(b)(1)(A), and the "additional duties" clause, 28 U.S.C. 636(b)(3).

a. Petitioner held that a wiretap application was a delegable pretrial matter within the meaning of the "pretrial matters" clause of Section 636(b)(1). Pet. App. 31a-32a, 39a-41a. That clause provides that "[n]otwithstanding any provision of law to the contrary[,] * * * a judge may designate a magistrate to hear and determine any pretrial matter pending before the court," except eight specified categories of potentially dispositive motions. Petitioner noted that Title III itself does not include the magistrate judge in its definition of a "judge of competent jurisdiction" authorized to rule on wiretap applications, expressly vesting that power only in "a judge of a United States district court or a United States court of appeals," 18 U.S.C. 2516(1), 2510(9)(a).[2] Pet. App. 32a, 35a. Petitioner determined, however, that the restrictive language of Title III did not bar referral of wiretap applications to magistrates. Pet. App. 38a.

Petitioner so held notwithstanding *United States* v. *Giordano,* 416 U.S. 505 (1974), which he acknowledged "could arguably apply" here. Pet. App. 33a. *Giordano* held that Section 2516(1) of Title III, 18 U.S.C. 2516(1),

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[2] Section 2516(1) provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant * * * an order authorizing or approving the interception of wire or oral communications.

Section 2510(9)(a) defines a federal "[j]udge of competent jurisdiction" as "a judge of a United States district court or a United States court of appeals."

which, as originally enacted, empowered only the "Attorney General or any Assistant Attorney General specially designated by the Attorney General" to authorize an application for a wiretap, precluded delegation of such authority to any other subordinate of the Attorney General. See Pet. App. 32a-33a. The Attorney General may ordinarily delegate "any function" to "any other officer" or "employee" of the Department of Justice pursuant to 28 U.S.C. 510. Pet. App. 32a. This Court held, however, that the Title III duties were non-delegable, because Section 2516(1), "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Giordano*, 416 U.S. at 514.

Petitioner distinguished *Giordano* based on the legislative histories of Title III and of the Federal Magistrates Act, and on the text of the "pretrial matters" clause. Pet. App. 33a. In petitioner's view, Title III's restrictive definition of "judge of competent jurisdiction" responded to the deficiencies in the old commissioner system, which preceded the federal magistrate system. Pet. App. 34a-35a. Congress determined that, although existing practice permitted United States commissioners to issue search warrants, such practice was "too permissive for the interception of wire or oral communications." Pet. App. 35a, quoting S. Rep. No. 1097, 90th Cong., 2d Sess. (1968). Petitioner viewed the Magistrates Act, enacted later that year, as a "more direct[ ]" remedy for the deficiencies in the commissioner system, however. Pet. App. 35a. The Magistrates Act replaced the commissioners with United States magistrates and ensured that they would be more competent and professional than their predecessors. *Id.* at 36a-38a. Petitioner concluded that, in light of the replacement of commissioners with the more reliable magistrates, "the referral of an eavesdropping application to a United States magis-

strate judge does not implicate any of the concerns underlying Title III's facially restrictive definition of judges who are competent to issue eavesdropping orders." *Id.* at 38a.

Petitioner also distinguished *Giordano* on the ground that, in contrast to the provision authorizing the Attorney General to delegate responsibilities, the Federal Magistrates Act was enacted in 1976, "after the enactment of Title III[,] and it contains a clause that permits the delegation of specified authority vested in district court judges *notwithstanding* any existing law to the contrary." Pet. App. 33a. In specifying that pretrial duties can be delegated "notwithstanding any provision of law to the contrary," Congress intended to "overcome any problem which may be caused by the fact that scattered throughout the code are statutes which refer to 'the judge' or 'the court.'" Pet. App. 39a, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976). Petitioner held that the broad authority to delegate "pretrial matters" to magistrate judges pursuant to Section 636 thus overrode Title III's express restriction of wiretap approvals to district and appellate judges.

b. Petitioner alternatively found authority to delegate the Title III application to magistrate judges in the "additional duties" clause of the Magistrates Act. Pet. App. 41a-48a. That clause states that "a magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. 636(b)(3). Petitioner held that the authorization of wiretaps could be delegated despite the clause's requirement that the delegation of a duty not be "inconsistent with the Constitution and laws of the United States," and this Court's statement in *Peretz* v. *United States,* 111 S. Ct. 2661, 2667 (1991), that "the delegated duty not be of 'far

greater importance' than specified duties that may be assigned to magistrates." Pet. App. 42a-43a.

According to petitioner, "[t]he delegation of a Title III application to a United States magistrate judge is not inconsistent with Title III merely because the latter provides that judges of the United States district courts may issue eavesdropping orders." Pet. App. 43a. Petitioner reasoned that "[a]ny case to which the 'additional duties' clause may be applicable will also involve the delegation of some duty that is vested initially in a judge." *Ibid.* Section 2510(9)(a) is not "inconsistent" with delegation because, in petitioner's view, "the facially restrictive definition of judges competent to issue Title III orders was not written for the purpose of denying United States magistrate judges the authority to issue such orders." Pet. App. 43a-44a.

Petitioner also concluded that the delegation of Title III applications to magistrate judges is not inconsistent with Article III of the United States Constitution. Pet. App. 46a-48a. Many magistrate functions require the parties' consent, see *Peretz* v. *United States,* 111 S. Ct. at 2667-2669, or may only be undertaken by magistrates subject to de novo review by the district court, see *United States* v. *Raddatz,* 447 U.S. 667 (1980); 28 U.S.C. 636(b)(1). In petitioner's view, however, no such constraints apply to magistrates' wiretap orders, "because the authorization of a wiretap falls within the category of nonadjudicatory functions that need not be performed by an Article III judge." Pet. App. 47a.

Petitioner analogized review of wiretap applications to the "additional duty" of issuing search warrants (which magistrates are expressly authorized to grant under Federal Rule of Criminal Procedure 41(a)). Pet. App. 44a. Petitioner reasoned that review of wiretap applications is an even more appropriate task for magistrate judges than

issuance of warrants because of the greater "burden of considering these applications" and of continuing to monitor wiretaps once they are approved. *Id.* at 45a.

2. The court of appeals granted the United States' mandamus petition and reversed. Pet. App. 1a-28a. The court held that Congress deliberately and specifically limited the Title III power to approve wiretap applications, and that the general catchall provisions of the Magistrates Act do not empower magistrate judges to approve such applications. *Id.* at 10a. The court emphasized that "in enacting Title III, Congress showed great concern for protecting individual privacy against the vast potential for intrusion posed by wiretapping." *Id.* at 14a. A wiretap is "like a continuous film of events in your home, secretly recorded over a period of weeks or months," and is therefore "far more intrusive than the familiar search pursuant to a warrant," which is more like a "snapshot." *Ibid.* Title III consequently "tightly control[s]" the authorization of wiretaps and the use of evidence derived from them. Pet. App. 5a.

The court of appeals acknowledged the intent behind the 1976 amendment of the Magistrates Act that statutory references to "the judge" or "the court" be read to include magistrate judges. Pet. App. 9a-10a. The court determined, however, that because Congress placed strict controls on the authorization of wiretaps in order to protect personal privacy, reviewing wiretap applications was not a delegable task. *Ibid.* The court concluded that, in view of Congress's privacy concerns, "any Congressional expansion of the list of those officers authorized to approve wiretaps would be specific rather than general and indirect." *Id.* at 10a.

The court of appeals also relied on the Electronic Communications Privacy Act of 1986 (Privacy Act), Pub. L.

No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. 3121-3127), which amended the definition section of Title III in many respects but did not amend the Section 2510(9)(a) definition of courts competent to approve wiretaps. Pet. App. 8a, 10a-11a. The court believed that Congress's failure to amend Section 2510(9)(a) was especially significant in view of the Privacy Act's specific authorization of magistrates to approve pen registers and trap and trace devices, which identify numbers dialed to or from a telephone but do not allow eavesdropping on conversations. Pet. App. 11a, 7a n.5. The court explained:

> If Congress in 1986 had believed magistrates to be "judge[s] of competent jurisdiction," as the term is used in Title III, 18 U.S.C. § 2510(9), who are authorized to issue wiretapping orders, then the Privacy Act could have empowered magistrates to issue pen register orders with a simple reference back to § 2510(9). Instead, however, the 1986 Privacy Act specifies persons empowered to authorize pen register orders by reference to a separate 'court of competent jurisdiction' section, which, unlike § 2510(9), specifically includes magistrates. See 18 U.S.C. § 3127(2)(A).

Id. at 8a-9a. In the court's view, "[t]here is a sharp contrast between the stringent controls over wiretap orders * * * and the much less onerous conditions for obtaining pen register and trap and trace authorization. * * * Congress * * * saw pen register and trap and trace monitoring, which magistrates may authorize, to be qualitatively different from wiretapping, which only an Article III federal judge or a state court judge of general criminal jurisdiction may authorize." *Id.* at 11a.

The court of appeals also rejected petitioner's attempts to distinguish *United States* v. *Giordano, supra,* which it viewed as "a case strikingly similar to the case at hand."

Pet. App. 11a. "The *Giordano* Court based its holding on the purpose and the legislative history of Title III, fairly read. The same approach also supports the view that Congress wanted to limit the power to review applications to specified judicial officers." *Id.* at 12a.

Judge Cardamone dissented. Pet. App. 15a-28a. Although he noted that whether district courts may delegate Title III applications to magistrate judges "presents a close question of statutory interpretation," *id.* at 15a, he agreed with petitioner that both the "pretrial matters" clause and the "additional duties" clause authorized that delegation.

ARGUMENT

Petitioner contends that the Federal Magistrates Act authorizes district court judges to delegate to magistrate judges the determination whether to issue Title III wiretap orders. Pet. 13-23. Petitioner is the only judge in the United States who has sought to delegate Title III applications to magistrate judges in the entire 26-year history of the Federal Magistrates Act and Title III. See Pet. App. 3a. The court of appeals correctly held that such delegation is unauthorized, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Title III vests the exclusive power to authorize federal wiretaps in "a judge of a United States district court or a United States court of appeals," 18 U.S.C. 2510(9);[3] it does not empower magistrate judges to grant such authorization. The limitation of wiretap authorization to Article III judges is one of several stringent con-

[3] Authorization of wiretaps at the state level may be made by "a judge of any court of general criminal jurisdiction of a State." 18 U.S.C. 2510(9)(b). The discussion in this brief is limited to authorization at the federal level.

trols on the issuance and execution of wiretaps under Title III. Congress deliberately imposed such controls in response to the degree of invasion of privacy involved in electronic eavesdropping. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious interception of wire and oral communications." *United States* v. *Giordano,* 416 U.S. 505, 515 (1974).

The court of appeals correctly held that construing the Magistrates Act to empower magistrate judges to approve wiretaps would conflict with Title III. Pet. App. 14a-15a. *Giordano* requires close adherence to Title III's textual restrictions. The purpose of Title III "was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act." *Giordano,* 416 U.S. at 514. Section 2510(1) allowed only "the Attorney General, or any Assistant Attorney General specifically designated by the Attorney General," to authorize a Title III application. Despite the Attorney General's power to delegate duties, *Giordano* held that duties under Section 2510(1) had to be performed by the specified officials. Section 2510(9) bars delegation of authority to approve wiretaps to magistrates just as clearly as Section 2516(1) precluded the Attorney General's delegation of authority to apply for wiretaps. Because Congress has not "specifically provided" in Title III that magistrate judges may authorize wiretap applications, *Giordano* compels rejection of petitioner's position.[4]

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[4] Petitioner concedes that "the Attorney General's delegation power was analogous to the power of district judges to delegate under the Magistrates Act." Pet. 21 n.16. He distinguishes *Giordano* on the

Congress's intent to limit the judicial officers who may approve wiretaps is underscored by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, codified as amended at 18 U.S.C. 3121-3127. See Pet. App. 7a-11a. The Privacy Act regulates law enforcement use of pen registers and trap and trace devices, which identify incoming and outgoing telephone calls. The Act extensively amended Title III, including the "Definitions" Section, 18 U.S.C. 2510, subsection 9 of which contains the Article III judge requirement.[5] Congress conspicuously left subsection 9 untouched, however, while it adopted a separate provision—Section 3127(2)—that defines a federal "court of competent jurisdiction" solely for purposes of pen register and trap and trace authorization as "a district court of the United States (including a magistrate of such a court) or a United States Court of Appeals." 18 U.S.C. 3127(2)(A). As the court of appeals pointed out, a simple reference to 18 U.S.C. 2510(9), rather than a separate new subsection, would have sufficed if magistrate judges were already encompassed within 18 U.S.C. 2510(9). Pet. App. 20a-21a.[6]

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ground that Congress added the "pretrial matters" clause to the Magistrates Act after it enacted Title III. *Ibid.* As the court of appeals pointed out, however, *Giordano* did not turn on the timing of Title III's enactment, but on Congress's concern to protect privacy, which the Court held requires strict adherence to the statutory text. Pet. App. 9a-10a.

[5] The Privacy Act made changes to subsections 1, 2, 4, 5, 8, 9(b), 10 and 11, and added subsections 12-18 to Section 2510. Pub. L. No. 99-508, Tit. I, § 101(a), (c)(1)(A) and (4), 100 Stat. 1848-1849, 1851.

[6] Petitioner contends that the court of appeals impermissibly rested its decision on "subsequent legislative materials" in relying on the 1986 Privacy Act. Pet. 19-22. The court of appeals, however, properly relied on the contrast between the treatment of magistrates under Sections 3127(2)(A) and 2510(9) in order to give Title III "that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law." *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 100 (1991).

2. Petitioner erred in relying on the Magistrates Act provision allowing district courts to assign "any pretrial matter" to a magistrate judge. Pet. App. 31a-41a. Although the "pretrial matters" clause applies "[n]otwithstanding any provision of law to the contrary," the court of appeals correctly concluded that Congress did not intend it to expand the class of judges empowered under Title III to authorize wiretaps. Pet. App. 10a.

Petitioner relies on legislative history explaining that the "notwithstanding" preamble was intended to make clear that general statutory references to "the judge" or "the court" do not preclude delegation to magistrates. Pet. App. 39a, quoting S. Rep. No. 625, 94th Cong., 2d Sess. 7 (1976); H.R. Rep. No. 1609, 94th Cong., 2d Sess. 9 (1976). The text of Section 2510(9) of Title III is, however, far more specific than a mere reference to "the judge" or "the court." Title III contains the highly distinctive feature of empowering judges of the courts of appeals as well as the district courts to authorize wiretaps. Congress's decision to include federal appellate judges underscores the importance it attached to the office of persons reviewing wiretap applications. It would be anomalous to conclude that Congress implicitly sanctioned delegation of that duty down to the cadre of federal magistrates.

It is unclear whether review of wiretap applications is even properly considered a "pretrial matter" under the Magistrates Act, as it does not relate to any trial or proceeding taking place under the auspices of the court. Congress's failure to specify wiretap authorizations as an enumerated pretrial matter, subject to de novo review, produces the unlikely consequence that magistrates could rule on wiretaps subject only to review for clear error. See 28 U.S.C. 636(b)(1). Given Congress's careful attention to avoiding unnecessary privacy intrusions of the gravity

posed by wiretaps, that conclusion is not plausible. Cf. *Gomez* v. *United States*, 490 U.S. 858, 873-874 (1989).

3. Petitioner also erred in invoking the "additional duties" clause, 28 U.S.C. 636(b)(3). Pet. App. 41a-48a. That clause allows delegation to magistrate judges only where "not inconsistent with the Constitution and laws of the United States." *Ibid.* Because Title III expressly limits the authority to authorize wiretaps to district court and court of appeals judges, assigning that function to magistrate judges is "inconsistent" with Title III.[7]

Petitioner sought to avoid that result by asserting that "[a]ny case to which the 'additional duties' clause may be applicable will also involve the delegation of some duty that is vested initially in a judge." Pet. App. 43a. Duties that district courts have delegated to magistrate judges, however, are generally assigned to "the court" or "the judge," and not more specifically, as under Title III, to "a judge of a United States district court or a United States court of appeals." For example, as petitioner noted, Federal Rule of Criminal Procedure 31 "provides that a jury verdict shall be returned to 'the judge' in open court," Pet. App. 43a n.10, and judges have delegated to magistrate judges the duty of accepting verdicts. *United States* v. *Johnson*, 962 F.2d 1308, 1312-1313 (8th Cir.), cert.

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[7] Under *Gomez*, "[a]ny additional duties performed pursuant to a general authorization in the statute should bear some relation to the specified duties." 490 U.S. at 864. Petitioner draws an analogy between issuance of search warrants and authorization of wiretaps. Pet. 19; Pet. App. 40a-41a. The differences in Congress's treatment of search warrants and wiretap authorizations are more telling, however, than their similarities. Unlike search warrants, which Federal Rule of Criminal Procedure 41(a) authorizes magistrates to grant, no such express authority exists under Title III. See pp. 9-11, *supra*. Indeed, Congress in enacting Title III deliberately chose to treat wiretap applications differently from warrant requests. Pet. App. 35a, quoting S. Rep. No. 1097, 90th Cong., 2d Sess. (1968).

denied, 113 S. Ct. 358 (1992). But Title III far more specifically identifies the judicial officers who may authorize a wiretap.[8]

4. Petitioner emphasizes the burdens that wiretap applications impose on district courts, noting that applications are accompanied by "long and prolix affidavits" and are followed by "equally lengthy and prolix renewal applications." Pet. App. 45a-46a. Wiretap applications are extensive because Congress requires that they include detailed information to ensure that wiretaps are justified. 18 U.S.C. 2518(1)(a)-(f) and (2). The limitation in Section 2510(9) derives from the same basic concern. It would be particularly inappropriate to rely on the burdens posed by one Title III safeguard as a reason to erode another.

In any event, the burdens wiretaps impose on the judiciary remain manageable. See Administrative Office of the United States Courts, Statistics Division, *Wiretap Report* (1993) (*1993 Report*). In 1993, federal judges au-

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[8] Congress did intend district courts to "experiment" with the use of magistrate judges under the Federal Magistrates Act in order to free their own time for uniquely judicial tasks. See S. Rep. No. 371, 90th Cong., 2d Sess. 26-27 (1968); S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976). Much of that experimentation is, however, valid only with the parties' consent. See, *e.g.*, *Peretz* v. *United States*, 111 S. Ct. 2661 (1991) (presiding over jury selection); *United States* v. *Arnoldt*, 947 F.2d 1120, 1124 (4th Cir. 1991) (accepting jury verdict), cert. denied, 112 S. Ct. 1666 (1992); *Allen* v. *United States*, 921 F.2d 78, 80 (6th Cir.) (reading final jury instructions to jury), cert. denied, 111 S. Ct. 2896 (1991); *United States* v. *Demarrias*, 876 F.2d 674, 677 (8th Cir. 1989) (presiding over jury deliberations, relaying jury questions to district judge, communicating judge's responses to jury, and accepting verdict). The "consent" rationale, however, cannot logically be applied to a wiretap application, which may be granted ex parte, 18 U.S.C. 2518(3), and which results in a sealed order, 18 U.S.C. 2518(8)(b). The target of a wiretap has no knowledge of it, and therefore cannot "consent" to delegation of an application to a magistrate until long after the application has been ruled on.

thorized 450 wiretap applications, and granted 459 extensions. *1993 Report*, at 9. Most of the 1018 federal judges sitting in 1993 received few if any wiretap applications that year. Even in those jurisdictions with the highest levels of law enforcement activity, judges rarely review more than three to five wiretap applications per year.[9] In view of the required annual reporting to Congress under 18 U.S.C. 2519(1), Congress is well aware of the extent of judicial involvement in authorizing wiretaps, and that magistrates have not participated in that process. Congress has not amended Title III to shift to magistrates the duty of authorizing wiretaps, and the court of appeals correctly declined to achieve that result through the Magistrates Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See generally *1993 Report*, Appendix A.

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(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1994

HON. EDWARD R. KORMAN, UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government's brief in opposition is most striking for what it does *not* say about the review of Title III wiretap applications by magistrate judges. Nowhere does the government argue or even suggest that the privacy interests with

which Congress was so concerned in Title III cannot be guarded adequately by magistrate judges, or that magistrate judges are less likely than appellate judges, district judges, and state court judges to concern themselves with the privacy interests inherent in electronic surveillance when ruling on wiretap applications. Indeed, because the government routinely supports the delegation of pretrial and trial-related tasks to magistrate judges, the absence of concern over the competence of magistrate judges to review wiretap applications is hardly surprising.

Because neither the government nor the court below has explained why magistrate judges should not be trusted to review wiretap applications, both have resorted to wordplay with the relevant (and some irrelevant) statutes. Moreover, the government engages in an unconvincing effort to minimize the significant burdens that review of Title III applications places on district judges. This Court should not sanction the government's unnecessary effort to curb experimentation with magistrate judges and should grant certiorari to review a decision that has significant consequences for the administration of justice in the federal courts.

1. The government's brief effort to minimize the first issue raised in the petition — the impact of the Second Circuit's decision on district judges' efforts to experiment with magistrate judges and thereby reduce their workloads — does not address the relevant issues. The government asserts that "[m]ost of the 1018 federal judges sitting in 1993 received few if any wiretap applications that year." Br. in Opp. 15. This figure, however, includes appellate judges, who virtually never review wiretap applications; the more relevant figure, cited in our petition (at 15), is the total number of authorized district court judgeships minus vacancies — currently, approximately 564.

Moreover, the government refers to the low number of "wiretap applications" that all judges and even judges in the

busiest districts must review. But the true extent of the burden of Title III review must take into account requests for extensions (which the government cites as 459 in 1993) and the periodic reports submitted by law enforcement officials (on which the government provides no figures). Extensions often are equally or more complex than the applications themselves because they include, in addition to whatever information is in the original application, information that has been accumulated since issuance of the order. Furthermore, the judge must review reports prepared by the U.S. Attorney every ten days that provide an update on the progress of the surveillance. The government's effort to minimize these burdens ignores the important fact that time spent reviewing Title III applications takes time away from a judge's core adjudicatory functions, and involves the judge in oversight of activities with which magistrate judges, due to their regular involvement in processing search warrants, are more familiar. And the government's own figures show that at least several hundred wiretap applications a year could be affected by the decision in this case; the government itself often petitions for certiorari in cases with far less widespread impact.

Judge Korman may indeed be the only federal judge so far to delegate Title III review to a magistrate judge, as the government asserts (Br. in Opp. 9), but this has no bearing on the importance of the issue presented. Every novel use of magistrate judges is a "first," but without further review by this Court the Second Circuit's decision is sure to deter judges in other districts from repeating Judge Korman's experiment.

2. The government, pointing to the fact that Title III authorizes judges of district courts and courts of appeals to approve wiretap applications, argues that Congress's enumeration of these judicial officers was a conscious limitation that reflects concern over "the degree of invasion of privacy involved in electronic eavesdropping." Br. in Opp. 10. That is no doubt true. Indeed, the history cited by petitioner

makes clear that the relatively untrained and unprofessional U.S. Commissioners were deemed unsuited to the task. Pet. App. 34a-35a. But there is no suggestion anywhere in the government's brief that the temperament, training, or experience of magistrate judges makes them less well suited than district or appellate judges to review Title III applications with sensitivity to the unique privacy concerns involved in eavesdropping.

Such a suggestion would, in any event, be misguided. As petitioner pointed out in his opinion, the determinations a magistrate judge must make before issuing a search warrant are similar in most respects to the determinations involved in issuing wiretap orders. Pet. App. 44a. Magistrate judges plainly are considered competent to protect the privacy interests associated with any conventional search, see Fed. R. Crim. P. 41(c), even though a search warrant may be so broad as to authorize extraordinary intrusions on personal privacy. And while the court of appeals and the government liken a wiretap to "a continuous film of events in your home, secretly recorded over a period of weeks or months" (Pet. App. 14a; Br. in Opp. 7), magistrate judges have been considered capable of authorizing the placement of hidden television surveillance cameras — an intrusion every bit as severe as electronic eavesdropping and one that demands the utmost in sensitivity to the privacy rights of persons under surveillance. *United States* v. *Biasucci*, 786 F.2d 504, 509 (2d Cir.), cert. denied, 479 U.S. 827 (1986). See also *United States* v. *Torres*, 751 F.2d 875, 885 (7th Cir. 1984) (television surveillance "is even more invasive of privacy" than interception of oral or wire communications), cert. denied, 470 U.S. 1087 (1985). There simply is nothing about the office of magistrate judge itself that disqualifies its members from performing the sensitive task of reviewing Title III wiretap applications. Accordingly, we turn to the government's statutory arguments, none of which withstands scrutiny.

3. The government makes a weak attempt to avoid the effect of the "notwithstanding" clause of the 1976 amendments to the Magistrates Act. In the government's view, this Court should discount both the plain meaning of the "notwithstanding" clause and its legislative history — which clearly indicates an intent to override previous statutory references to "the judge" or "the court" — because Title III contains the "distinctive" feature of empowering judges of the courts of appeals to review wiretap applications. Br. in Opp. 12.

In the first place, this argument ignores plain statutory language providing that district judges may delegate "*any* pretrial matter," and may do so "notwithstanding *any* provision of law to the contrary." 28 U.S.C. § 636(b)(1)(A) (emphasis added). That language encompasses all existing statutes vesting authority to rule on pretrial matters in a judge, regardless of the level that judge occupies in the federal judicial hierarchy.

Moreover, the delegation to judges of the courts of appeals has no special significance that would remove Title III from the class of statutes Congress intended to affect through the 1976 amendments. Congress has frequently included court of appeals judges among those empowered to perform a variety of judicial tasks that are normally performed by district court judges, such as granting a habeas corpus petition or a stay of state court proceedings in connection with a habeas petition (28 U.S.C. §§ 2241(a),(b); 2251), or releasing a defendant on bail pending sentence or appeal (18 U.S.C. § 3141(b)).

Furthermore, at the same time Congress enacted the supposedly "stringent" control of limiting review of wiretap applications to Article III judges (Br. in Opp. 9), it empowered any judge of a state court of general criminal jurisdiction to review applications, so long as the judge is authorized by a state statute to issue orders for the interception or wire, oral, or electronic communications. 18

U.S.C. § 2510(9)(b). The government finds it "anomalous" that Congress would sanction review of wiretap applications "down to the cadre of federal magistrates" when it empowered federal appellate judges to conduct review (Br. in Opp. 12), but it sees nothing unusual about the delegation of this authority to elected state judges, who often have less training and experience than the skilled professional magistrate judges. If anything, state judges in many jurisdictions are more likely than appointed magistrate judges to be subject to the types of pressures that could affect their concern with privacy interests. Congress's delegation of Title III authority to state judges demonstrates that neither the delegation to Article III judges in general, nor the delegation to judges of the federal courts of appeals, renders Title III impervious to the general mandate of the "notwithstanding" clause.

This Court's decision in *Giordano* v. *United States*, 416 U.S. 505 (1974), does not dictate otherwise. The government's discussion of *Giordano* dismisses the most critical feature of that case — namely, the fact that Title III's specification of the Justice Department officials who could authorize wiretap applications *postdated* the statute permitting the Attorney General to delegate his powers.* Thus, in *Giordano*, the Title III limitation reasonably could be construed as a rejection in the wiretap context of the earlier, broad delegation powers granted to the Attorney General.

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* The government acknowledges this distinguishing feature of *Giordano* in a footnote (Br. in Opp. 10-11 & n.4), but then dismisses it with the nonresponsive observation that *Giordano* "requires strict adherence to the statutory text." Here, of course, "strict adherence to the statutory text" favors petitioner, not the government: "[n]otwithstanding *any* provision of law to the contrary * * * a judge may designate a magistrate to hear and determine *any* pretrial matter" (28 U.S.C. § 636(b)(1)(A) (emphasis added)).

Here, however, no similar inference can be drawn from Congress's reference in Title III to judges of district and appellate courts. As petitioner pointed out in his opinion, the legislative history conclusively demonstrates that the 1968 Congress's purpose in empowering only judges to review wiretap applications stemmed from its concern that the then-existing U.S. Commissioners were not up to the task. Pet. App. 35a; see S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.S.C.A.N. 2112, 2179. When Congress abolished the office of U.S. Commissioner later in 1968 and created the office of magistrate, Congress's reason for placing review power over federal wiretap applications exclusively in the hands of Article III judges evaporated. And, when Congress in 1976 empowered magistrate judges to handle pretrial matters "notwithstanding any other law to the contrary," it made clear its intention to overcome prior references to "the judge" or "the court." H.R. Rep. No. 1609, 94th Cong., 2d Sess., *reprinted in* 1976 U.S.S.C.A.N. 6162. Thus, unlike the situation in *Giordano*, Congress broadened the delegation powers of federal judges in all circumstances in which a statutory reference to "judge" or "court" might otherwise appear to limit authority to an Article III judge, and it did so with full knowledge that many existing statutes contained such limitations.

Giordano also turned on the Court's concern over delegation from the Attorney General to his Executive Assistant. Congress had taken pains to circumscribe the authorizing power to politically responsible officials, and the Court was loath to disturb that allocation of power. *Giordano*, 416 U.S. at 516-523. A magistrate judge, by virtue of the requirement that he meet a host of statutorily prescribed qualifications, stands in a far different relationship to a district judge than the Attorney General's Executive Assistant stood in relation to the Attorney General.

The government also errs, as did the court of appeals, in relying on the Electronic Communications Privacy Act of

1986 to inform the scope of Article III judges' authority under Title III. Br. in Opp. 11. Had Congress simply referred to 18 U.S.C. § 2510(9) in order to empower magistrate judges to issue pen register orders, as the government suggests, the pen register statute would have been extremely confusing. It would have been quite unclear whether the reference back to Section 2510(9) was intended to incorporate the expansive affect of the 1976 Magistrates Act amendments. One would have to consider not only the reference back to Section 2510(9), but also the relevant portions of the Magistrates Act, to determine which judicial officers were authorized to issue pen register orders. The far simpler method was to make explicit in the new statute what Congress had already effectuated for Title III through the Magistrates Act; that action was not intended to alter the meaning of the 1976 amendments. See Pet. 19-22.

4. The government suggests that Congress's failure in the Magistrates Act to place wiretap authorizations within the class of pretrial matters subject to de novo district court review produces the "unlikely consequence," if Judge Korman prevails, that magistrate judges could issue wiretap orders subject to review only for clear error. Br. in Opp. 12. In finding fault with the lack of an opportunity for pretrial review of magistrate-issued wiretap orders, however, the government has merely described the lack of reviewability of *all* orders authorizing law enforcement officials to conduct a search, whether those searches are physical or through electronic eavesdropping and whether issued by a district judge or a magistrate judge. Thus, the government's argument does nothing to differentiate magistrate judges from other judges, and provides no reason for withholding this power from them.

Title III contains no procedure for review of *any* judge's issuance of a wiretap order, much less the de novo review the government implies should be required if magistrate judges were to issue wiretap orders under the authority of the

pretrial matters clause. As with the issuance of a search warrant, the propriety of an order authorizing a wiretap may be reviewed in an appeal by the defendant following the denial of a suppression motion and subsequent conviction, cf. *DiBello* v. *United States*, 369 U.S. 121 (1962), or in an appeal by the government following the grant of a suppression motion. 18 U.S.C. §§ 2518(10)(b), 3731.

While the government may take an appeal from the denial of an application for an order, 18 U.S.C. § 2518(10)(b), nothing in that section indicates that this right would be any different if the application were denied by a magistrate judge. Indeed, Section 2518(10)(b) provides a procedure for an appeal of a denial made by a "judge *or other official*" (emphasis added). In short, the government's reviewability argument is a pure straw man. Review of any decision by a magistrate judge on a wiretap order would proceed in precisely the same fashion as review of the identical decision by any other judicial officer empowered to review wiretap applications. Given this treatment of review of wiretap orders, Congress's concern about privacy in connection with wiretaps (see Br. in Opp. 12-13) adds nothing to the analysis of whether review of wiretap applications is properly considered a pretrial matter.

5. The government attempts to circumvent the Magistrates Act's "additional duties" clause by attaching special importance to the phrase "a judge of a United States district court or a United States court of appeals" in 18 U.S.C. § 2510(9). In the government's view, Congress's use of this language, rather than simply "the judge" or "the court," is dispositive. Br. in Opp. 13-14.

The language of Section 2510(9) simply cannot bear the weight the government's curious contention ascribes to it. First, as we showed above, the vesting of wiretap review power in appellate judges has no bearing on the scope of Article III judges' delegation powers. Second, the words "of

a United States district court" cannot possibly have been intended as a limitation on the power of district judges to delegate functions to magistrate judges. Rather, as the legislative history makes clear, the intent was to prevent *commissioners* from ruling on wiretap applications because of concerns over their professionalism. When the commissioner system was abolished and district judges were given broad power to delegate "such additional duties as are not inconsistent with the Constitution and laws of the United States," 28 U.S.C. § 636(b)(3), any rationale for the government's restrictive reading of Section 2510(9) disappeared.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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